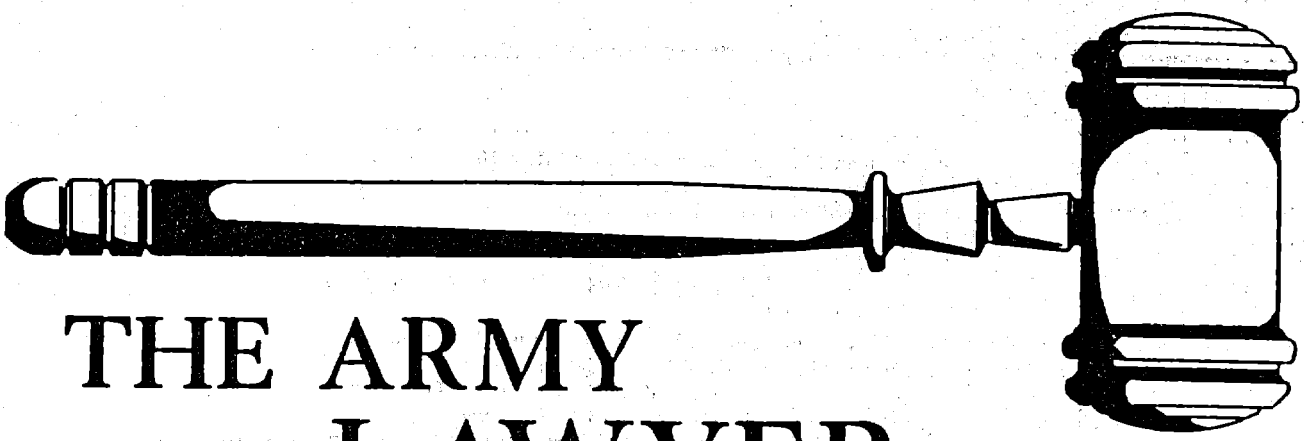

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DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, DC 20310-2200

REPLY TO
ATTENTION OF
JALS-TCA

30 AUG 1990

MEMORANDUM FOR STAFF AND COMMAND JUDGE ADVOCATES

SUBJECT: Trial Counsel Assistance Program - Policy Letter 90-03

1. Outside the expertise in your own office, the Trial Counsel Assistance Program (TCAP) is the first and best source of advice to trial counsel and chiefs of military justice. TCAP provides the following important services:

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William K. Suter

WILLIAM K. SUTER
Major General, USA
Acting The Judge Advocate General

Mistake of Fact and Carnal Knowledge

Major Eugene R. Milhizer
Instructor, Criminal Law Division, TJAGSA

Introduction

In recent years, the military's appellate courts repeatedly have addressed how the mistake of fact defense[1] applies to a variety of offenses under the Uniform Code of Military Justice.[2] These cases illustrate that applying the defense is often a complicated undertaking. The defense has proven to be particularly troublesome in the context of sex offenses, which generally have special *mens rea* requirements for certain elements of proof. Indeed, this author recently criticized one court's application of the mistake of fact defense to the crime of assault with intent to commit rape.[3]

The latest reported case addressing the mistake of fact defense with respect to a sex offense is *United States v. Adams*.[4] In *Adams* the Army Court of Military Review concluded that a mistake of fact as to the identity of the accused's sexual partner, even if honest and reasonable, is not a defense to carnal knowledge.[5] Before discussing *Adams*, however, a brief review of the mistake of fact defense is appropriate.

Mistake of Fact Generally

The defense of ignorance or mistake of fact has deep historical roots. Both the common law[6] and the military justice system[7] have long permitted the defense. The Court of Military Appeals has recognized ignorance or mistake of fact as a defense for well over thirty years.[8] In addition, the defense appears in the current Manual for Courts-Martial under Rules for Courts-Martial 916(j).[9] The defense under military law generally is consistent with the mistake of fact defenses adopted by most civilian jurisdictions.[10]

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[1]Manual for Courts-Martial, United States, 1984 [hereinafter MCM, 1984], Rule for Courts-Martial 916(j) [hereinafter R.C.M.].

[2]Uniform Code of Military Justice, 10 U.S.C. §§ 801-940 (1982) [hereinafter UCMJ]. For a discussion of some of these decisions, see generally TJAGSA Practice Note, *Recent Applications of the Mistake of Fact Defense*, The Army Lawyer, Feb. 1989, at 66.

[3]*See* UCMJ art. 134; *see* MCM, 1984, Part IV, para. 64. *See generally* TJAGSA Practice Note, *Mistake of Fact and Sex Offenses*, The Army Lawyer, Apr. 1990, at 65 (criticizing United States v. Langley, 29 M.J. 1015 (A.C.M.R. 1990)).

[4]30 M.J. 1035 (A.C.M.R. 1990).

[5]*See* UCMJ art. 120(b); MCM, 1984, Part IV, para. 45.

[6]*E.g.*, 1 M. Hale, Historia Placitorum Coronal 42 (1768) ("in some cases *ignorantia facts* doth excuse") (emphasis in original).

[7]Colonel Winthrop wrote:

> It is generally laid down that ignorance of fact excuses crime. But his must be an honest innocent ignorance, and not an ignorance which is the result of carelessness or fault. The theory of course is that where a *bona fide* ignorance of fact exists there must be an absence of the requisite wrongful *intent*. The general rule applies equally to military cases; and the ignorance, to constitute a defense therein, must appear not to have proceeded from any want of vigilance, or from failure to make the inquiries or obtain the information reasonably called for by the obligations and usages of the service. Thus an officer who presents a fraudulent claim against the United States without knowing it to be fraudulent, or a soldier who neglects to report for guard or other duty because ignorant of the fact that he has been duly detailed therefor, is not guilty of a breech, in the one case of the 60th, or in the other of the 33d Article of war, unless his ignorance is the result of his own negligence or wrong-doing.

W. Winthrop, Military Law and Precedents 291 (2d ed. 1920) (footnotes omitted) (emphasis in original). *See generally* Manson, *Mistake as a Defense*, 1-10 Mil. L. Rev. (Selected Reprints) 307 (1965).

[8]*E.g.*, United States v. Lampkins, 15 C.M.R. 31 (C.M.A. 1954).

[9]R.C.M. 916(j):

> *Ignorance or mistake of fact.* Except as otherwise provided in this subsection, it is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense. If the ignorance or mistake goes to an element requiring premeditation, specific intent, willfulness, or knowledge of a particular fact, the ignorance or mistake need only have existed in the mind of the accused. If the ignorance or mistake goes to any other element requiring only general intent or knowledge, the ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. However, if the accused's knowledge or intent is immaterial as to an element, then ignorance or mistake is not a defense.

This subsection is based on Manual for Courts-Martial, United States, 1969 (rev. ed.), para. 216*i*.

[10]*See generally* 1 P. Robinson, Criminal Law Defenses § 62; 1 Wharton's Criminal Law § 76 (C. Torcia 14th ed. 1978); R. Perkins & R. Boyce, Criminal Law 1044-54 (3d ed. 1982); W. LaFave & A. Scott, Substantive Criminal Law § 5.1 (1986).

Mistake of fact properly operates as a failure of proof defense.[11] More precisely, assertion of the defense may negate evidence of the mental state required for a particular element of an offense based upon a mistaken belief by the accused.[12] Accordingly, one commentator has stated, "Whether a defendant's ignorance or mistake in any particular case will negate a required element depends, of course, on the nature of the mistake and the state of mind that the offense definition requires."[13] Other authorities, however, properly have pointed out that under some circumstances "'[d]eliberate ignorance' of a fact can create the same criminal liability as actual knowledge thereof."[14]

The defense of ignorance or mistake usually operates in one of two distinct ways. When proof of a certain special *mens rea* element[15] is essential to sustain a conviction for an offense, an honest but unreasonable mistake of fact can constitute a defense to that element. For example, the offenses of larceny and wrongful appropriation[16] each require proof that the accused had a specific intent to do a certain act;[17] thus, an honest but unreasonable mistake negating that intent can constitute a defense.[18] An honest mistake of fact likewise may serve as a defense to several other offenses having special *mens rea* requirements, such as robbery[19] and making a false or fraudulent claim.[20]

When proof of an element at issue requires evidence only of the accused's general criminal intent, an objective standard applies in evaluating a claim of mistake of fact. To be entitled to the defense in these circumstances, the accused's mistake must be both honest and reasonable. For example, an honest and reasonable belief that the accused had authority to be absent is a valid defense to a charge of absence without leave;[21] when the belief ceases to be reasonable, however, the defense no longer is available.[22] Likewise, an accused's belief that he had a permanent shaving profile, if both honest and reasonable under the circumstances, could constitute a defense to failure to obey a general regulation.[23]

An intermediate application of the defense of ignorance or mistake of fact occurs less frequently. Certain offenses, such as a dishonorable failure to pay just debts[24] and bad check offenses charged under article 134,[25] expect persons subject to UCMJ to exercise a special degree of prudence. If the accused's mistake or ignorance is the result of bad faith or gross indifference, the law will not exonerate him for these offenses even if the mistake or ignorance was honest.[26]

The military's appellate courts have recognized expressly an important limitation upon the defense of mistake of fact. To sustain the defense, the mistaken

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[11] *See generally* 1 P. Robinson, *supra* note 10, at § 62 (1984); TJAGSA Practice Note, *supra* note 2, at 66-67.

> "Failure of proof defenses consist of instances in which because of the conditions that are the basis for the 'defense,' all elements of the offense charged cannot be proven. They are in essence no more than a negation of an element required by the definition of the offense." Examples of this type of defense depend largely upon the elements of proof of the offenses as set forth under the system or code involved. Alibi and good character are classic examples of failure of proof defenses.

Milhizer, *Voluntary Intoxication as a Criminal Defense Under Military Law*, Mil. L. Rev. 131, 147 n.93 (1990) (quoting 1 P. Robinson, *supra* note 10, at 72); *see* R.C.M. 916(a) discussion.

[12] *See* Model Penal Code § 2.04(1)(a) (proposed Official Draft 1962). The Model Penal Code recognizes the mistake of fact defense in the following terms: "Ignorance or mistake as to a matter of fact or law is a defense if: ... the ignorance or mistake negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense ...." *Id.*

[13] 1 P. Robinson, *supra* note 10, at 246-47.

[14] United States v. Newman, 14 M.J. 474 (C.M.A. 1983) (and cases cited therein). *See generally* Perkins & Boyce, supra note 10, at 1047.

[15] *See* R.C.M. 916(j). These special *mens rea* requirements are premeditation, specific intent, willfulness, and knowledge. *Id.*

[16] UCMJ art. 121.

[17] *See* MCM, 1984, Part IV, para. 48b(1)(d) & (2)(d).

[18] *E.g.*, United States v. Turner, 27 M.J. 317 (C.M.A. 1988); United States v. Greenfeather, 32 C.M.R. 151, 156 (C.M.A. 1962); United States v. Hill, 13 C.M.R. 158 (C.M.A. 1962); United States v. Malone, 14 M.J. 563 (N.M.C.M.R. 1982); *see also* United States v. Jett, 14 M.J. 941 (A.C.M.R. 1982). *See generally* United States v. Sicley, 20 C.M.R. 118 (C.M.A. 1955).

[19] UCMJ art. 122; *see* United States v. Mack, 6 M.J. 598 (A.C.M.R. 1978).

[20] UCMJ art. 132; *see* United States v. Groves, 23 M.J. 374 (C.M.A. 1987); United States v. Ward, 16 M.J. 341, 345 (C.M.A. 1983).

[21] UCMJ art. 86.

[22] United States v. Graham, 3 M.J. 962, 965 (N.C.M.R. 1977).

[23] UCMJ art. 92; *see* United States v. Jenkins, 47 C.M.R. 120 (C.M.A. 1973).

[24] UCMJ art. 134; *see* MCM, 1984, Part IV, para. 71.

[25] *See* MCM, 1984, Part IV, para. 68.

[26] *See* R.C.M. 916(j) discussion; TJAGSA Practice Note, *supra* note 1, at 67; Richmond, *Bad Check Cases: A Primer for Trial and Defense Counsel*, The Army Lawyer, Jan. 1990, at 3, 9.

belief held by the accused must be one which, if true, would be exonerating.[27] Put another way, "the mistaken belief must be of such a nature that the conduct would have been lawful had the facts been as they were reasonably believed to be."[28] Thus, the accused's mistaken belief that the illegal drug he possessed was one other than the illegal drug charged will not be a defense.[29] Similarly, the belief that homicide victims were detained prisoners of war (PWs) rather than noncombatants will not operate as a defense to murder, because killing PWs constitutes the same crime.[30]

The Court of Military Appeals, in *United States v. Carr*, announced the only expressly recognized exception under military law to the rule that a mistaken belief must be one that otherwise would exonerate the accused.[31] In *Carr* the court determined that the law entitled the accused to assert the mistake of fact defense for rape,[32] based upon his honest and reasonable mistaken belief that the victim was consenting, even if he otherwise would have been guilty of adultery.[33] The court observed that "it would seem whimsical to let guilt or innocence of rape hinge on the marital status of one of the participants."[34]

Despite the court's conclusion in *Carr*, most courts traditionally have found that a "mistake of fact relating only to the degree of the crime or gravity of the offense will not shield a deliberate offender from the full consequences of the wrong actually committed."[35] As one court has observed, "[i]t is a familiar rule that, if one intentionally commits a crime, he is responsible criminally for the consequences of his act, [even] if the offense proves to be different from that which he intended."[36] Professors Perkins and Boyce have cited favorably several decisions applying this rationale.[37]

Moreover, courts occasionally have ruled that some forms of noncriminal misconduct nevertheless may be sufficiently wrongful that mistake of fact will not operate as a defense to the accused's unintended and mistaken commission of a criminal offense.[38] For example, in *White v. State*[39] the defendant abandoned his wife, whom he then did not realize was pregnant. However, even though abandoning one's wife was not otherwise punishable as a crime, the court found that such conduct clearly was wrongful in a moral sense. Accordingly, the *White* court did not allow the defendant to assert mistake of fact as a defense to the crime of abandoning a pregnant wife.

Disallowing mistake of fact under circumstances in which the accused engages in noncriminal misconduct has an obvious deterrent effect. Placing the burden of ascertaining the true facts upon the one engaging in conduct that is morally wrong, or otherwise offensive and dangerous, presumably will discourage that conduct. Consequently, the accused's expectation of facing a more onerous burden of proof at trial, should mistake of fact become an issue, satisfies the recognized penological goals of specific and general deterrence.[40]

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[27] *See generally* Perkins & Boyce, *supra* note 10, at 916-17.

[28] United States v. Rowan, 16 C.M.R. 4, 7 (C.M.A. 1954).

[29] United States v. Jefferson, 13 M.J. 779 (A.C.M.R. 1982) (mistake not exonerating when accused accepted heroin thinking it was hashish); United States v. Coker, 2 M.J. 304, 308 (A.F.C.M.R. 1976), *rev'd on other grounds*, 4 M.J. 93 (C.M.A. 1977) (accused's belief that drug he sold was a contraband substance other than the charged substance not a defense); United States v. Anderson, 46 C.M.R. 1073, 1075 (A.F.C.M.R. 1973) (accused may not defend against charged LSD offense with belief he possessed mescaline); *see* United States v. Mance, 26 M.J. 244, 254 (C.M.A. 1988); United States v. Rowan, 16 C.M.R. 4, 7 (C.M.A. 1954).

[30] United States v. Calley, 46 C.M.R. 1131, 1179 (A.C.M.R.), *aff'd*, 48 C.M.R. 19 (C.M.A. 1973). The accused's intent to kill those whom he believed were detained PWs met the requisite mental state for the charged offense. *See id.*

[31] 18 M.J. 297 (C.M.A. 1984).

[32] UCMJ art. 120.

[33] UCMJ art. 134; *see* MCM, 1984, Part IV, para. 62.

[34] *Carr*, 18 M.J. at 301. The law recognizes a somewhat similar anomaly with respect to voluntary intoxication. Although possession and use of some intoxicants under some circumstances can constitute a crime, an accused can negate special *mens rea* requirements of the voluntary use of such intoxicants. *See generally* Milhizer, *supra* note 11, at 132 n.7.

[35] Perkins & Boyce, *supra* note 10, at 916.

[36] Commonwealth v. Murphy, 165 Mass. 66, 70, 42 N.E. 504, 505 (1896) *cited in* Perkins & Boyce, *supra* note 10, at 916 n.12; *see* Regina v. Prince, L.R. 2 Cr. Cas. Res. 154, 179 (1875); Rex v. Wallendorf, So. Afr. L. R. (1920) App. Div. 383, 397.

[37] Perkins & Boyce, *supra* note 10, at 916 (citing Regina v. Prince, L.R. 2 Cr. Cas. Res. 154, 156 (1875) (intruder's mistaken belief that night had just come to an end would not save him from conviction of common-law burglary)); State v. Davis, 95 Ohio App. 23, 117 N.E.2d 55 (1953), *appeal dismissed*, 160 Ohio St. 205, 115 N.E.2d 5 (1953) (one who employed a minor in an unlawful "numbers racket" activity is guilty of the greater offense of contributing to the delinquency of a minor, despite his mistake as to the youth's age); Model Penal Code § 110 (Tent. Draft No. 2, 1954) (the amount actually stolen, and not the offender's belief as to value, determines whether the offense is grand or petty theft).

[38] Perkins & Boyce, *supra* note 10, at 917 (and cases cited therein).

[39] 44 Ohio App. 331, 185 N.E. 64 (1933).

[40] *See generally* United States v. Lania, 9 M.J. 100 (C.M.A. 1980); Pfau & Milhizer, *The Military Death Penalty and the Constitution: There Is Life After Furman*, 97 Mil. L. Rev. 35, 51-60 (1982).

This broad concept of wrongfulness, which transgresses criminal forms of misconduct, undergirds the strict liability class of offenses.[41] Although military law recognizes very few strict liability offenses,[42] one exception is the improper use of a countersign.[43] Military law provides that the accused's intent, motive, negligence, mistake, or ignorance in disclosing a countersign or parole is immaterial to the issue of guilt.[44] Presumably, the law does not allow mistake of fact as a defense for this misconduct because of the special need to deter improper disclosure of sensitive information and the concomitant requirement that service members must make extraordinary efforts to ensure that any such disclosure is proper.

Carnal knowledge, the offense at issue in *Adams*, also has strict liability aspects. Before addressing the crime of carnal knowledge in detail, however, this article briefly will survey military cases applying mistake of fact as a defense to other sex offenses.

Mistake of Fact and Sex Offenses

Mistake of fact frequently arises in the context of sexual offenses. As noted earlier, military law now expressly recognizes that an honest and reasonable mistake of fact as to the victim's consent can operate as a defense to rape.[45] Permitting the accused to assert mistake of fact as a defense in a rape case constitutes a logical application of the defense because the element concerning consent, in the context of a rape charge, requires only a general criminal intent.

The defense applies differently, however, in the case of attempted rape,[46] which is a specific intent offense. As the Air Force Court of Military Review observed in *United States v. Daniels*,[47] "'in order to find [the accused] guilty of attempted rape, [the fact finder] must find beyond a reasonable doubt that 'the act was done with the specific intent to commit the offense of rape' and that at the time of the act 'the accused intended *every* element of rape.'"[48] In *United States v. Polk*[49] the Army Court of Military Review reached a similar conclusion.

More recently, in *United States v. Langley*,[50] the Army Court of Military Review concluded that an honest and reasonable mistake of fact as to the victim's consent is necessary to constitute a defense to assault with intent to commit rape.[51] As noted earlier, this commentator has criticized the *Langley* case as applying an incorrect standard for the mistake of fact defense.[52] The decision in *Langley* also appears to be inconsistent with prior case law from the Court of Military Appeals[53] and the Army Court of Military Review,[54] as well as guidance found in the Manual for Courts-Martial.[55]

Military courts also have examined mistake of fact as a defense to indecent assault.[56] For instance, in *United States v. McFarlin*[57] the Army Court of Military Review concluded that the accused's mistake regarding the

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[41] Perkins & Boyce, *supra* note 10, at 917-20, 1047-48. *But cf.* R.C.M. 916(e)(5) (although self-defense is justified, an honest and reasonable mistake of fact will not exculpate an actor who comes to the aid of someone not entitled to act in self-defense). For an excellent criticism of the military's formulation of the defense of another, see Byler, *Defense of Another, Guilt Without Fault?*, The Army Lawyer, Jun. 1980, at 6.

[42] *See generally* R.C.M. 916(j) discussion.

[43] UCMJ art. 101.

[44] MCM, 1984, Part IV, para. 25c(4).

[45] *See* United States v. Carr, 18 M.J. 297 (C.M.A. 1984). In *Carr* the Court of Military Appeals held that mistake of fact as to the victim's consent can operate as a defense to rape. *Id.* at 301-02; *accord* United States v. Taylor, 26 M.J. 127, 128 (C.M.A. 1988). *See generally* Wilkins, *Mistake of Fact: A Defense to Rape*, The Army Lawyer, Dec. 1987, at 4. Earlier cases avoided the issue, finding that the requirement that the victim make her lack of consent reasonably manifest adequately covered any possible mistake of fact. *E.g.*, United States v. Steele, 43 C.M.R. 845 (A.C.M.R. 1971).

[46] UCMJ art. 80; *see* MCM, 1984, Part IV, para. 4.

[47] 28 M.J. 743 (A.F.C.M.R. 1989).

[48] *Daniels*, 28 M.J. at 747-48 (emphasis in original) (citing MCM, 1984, Part IV, paras. 4b(2) & c(1)).

[49] 48 C.M.R. 993 (A.C.M.R. 1974).

[50] 29 M.J. 1015 (A.C.M.R. 1990).

[51] UCMJ art. 134; *see* MCM, 1984, Part IV, para. 64.

[52] *See* TJAGSA Practice Note, *supra* note 3.

[53] United States v. Hobbs, 23 C.M.R. 157, 162 (C.M.A. 1957); *see* United States v. Gibson, 11 M.J. 435, 436 (C.M.A. 1981).

[54] *Polk*, 48 C.M.R. at 996.

[55] MCM, 1984, Part IV, para. 64c(4).

[56] UCMJ art. 134; *see* MCM, 1984, Part IV, para. 63.

[57] 19 M.J. 790 (A.C.M.R.), *petition denied*, 20 M.J. 314 (C.M.A. 1985).

victim's consent must be both honest and reasonable to constitute the defense. The court wrote, "Even though indecent assault is a specific intent offense,[58] the applicable standard is an honest *and reasonable* mistake. This is because the mistake in question did not relate to *appellant's* intent but rather to another element, the presence or absence of the victim's consent."[59] Unfortunately, appellate courts and boards have not always recognized the fine distinction that the *McFarlin* court drew when it applied mistake of fact to a particular element of the indecent assault at issue, rather than to all of the elements of the offense indiscriminately.[60]

United States v. Adams

On 25 May 1990, the Army Court of Military Review decided the case of *United States v. Adams*. The accused in *Adams* pleaded guilty, *inter alia*, to carnal knowledge with his fifteen-year-old niece. The accused testified during the providence inquiry that after a long day at work, he drank some beer and then went to sleep in his bed.[61] The accused's wife was away at work, but his niece, who resided with the accused for several years and whom the accused subsequently adopted, was present in the home. According to the niece's pretrial statement attached to the stipulation of fact, she climbed into the accused's bed desiring to have sexual intercourse with him. The accused, while in a semiconscious state, thought the niece was his wife. He quickly became aroused and began having sexual intercourse with her. The accused testified that as soon as he realized that his partner was not his wife, he ceased having sexual intercourse with her.[62]

The Army Court of Military Review found that the accused had an honest mistake of fact as to the identity of his sexual partner.[63] The court, however, did not address expressly whether the accused's mistaken belief was also reasonable. The court apparently found that resolving the reasonableness issue was unnecessary by concluding that a mistake of fact as to the identity of one's sexual partner never could operate as a defense to carnal knowledge. The court reasoned that "male soldiers bear the risk that the female may not be sixteen years of age or not his wife, no matter how honestly or reasonably mistaken the soldier may be about the female sexual partner before him."[64] The court, in short, applied a strict liability standard to all of the elements of carnal knowledge that concern the identity of the accused's partner. The court's reasoning, however, was faulty for the reasons discussed below.

Adams Criticized

Article 120(b) of the UCMJ proscribes carnal knowledge as follows: "Any person subject to this chapter who, under circumstances not amounting to rape, commits an act of sexual intercourse with a female not his wife who has not attained the age of sixteen years, is guilty of carnal knowledge ... ." Carnal knowledge has the following three elements of proof:

> (a) That the accused committed an act of sexual intercourse with a certain female;
>
> (b) That the female was not the accused's wife; and
>
> (c) That at the time of the sexual intercourse the female was under 16 years of age.[65]

The Manual provides further elaboration regarding mistake of fact as it pertains to the offense of carnal knowledge as follows:

> It is no defense that the accused is ignorant or misinformed as to the true age of the female, or that she was of prior unchaste character; it is the fact of the girl's age and not his knowledge or belief which fixes his criminal responsibility. Evidence of these matters should, however, be considered in determining an appropriate sentence.[66]

Thus, according to the plain language of the Manual, an accused is strictly liable for any mistaken belief as to his partner's true age.[67] Furthermore, the application of the strict liability standard to the age element of carnal

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[58] *Id.* (referring to the specific intent "to gratify the lust and sexual desires of the accused."); *see* MCM, 1984, Part IV, para. 63b(2).

[59] *McFarlin*, 19 M.J. at 793-94 (emphasis in original) (footnotes and citations omitted).

[60] *See generally* Milhizer, *supra* note 11, at 158-60.

[61] *Adams*, 30 M.J. at 1036.

[62] *Id.* The accused explained to the military judge that he realized his partner was not his wife when he heard her call him "Dad." *Id.*

[63] *Id.*

[64] *Id.* at 1037.

[65] MCM, 1984, Part IV, para. 45b(2).

[66] *Id.*, Part IV, para. 46c(2).

[67] *See* Perkins & Boyce, *supra* note 10, at 218-19.

knowledge is a traditional and almost uniform rule in American jurisdictions.[68]

Conversely, an accused apparently is not strictly liable for mistakes relating to other elements of proof required to convict him of carnal knowledge, including those pertaining to the marital status of the female. The Court of Military Appeals, in dicta, seemingly has endorsed a restrictive application of strict liability to the elements of carnal knowledge by inferring that the strict liability standard relates only to the age element of that offense.[69] Several commentators share this view that disallowing the mistake of fact defense to carnal knowledge is limited solely to the issue of the female's true age.[70] Likewise, this author's research has disclosed no federal or state decisional authority holding that the strict liability standard should prevent an accused from asserting mistake of fact as a defense to any of the elements of carnal knowledge except for the age element.

The view that strict liability applies selectively to the age element of carnal knowledge is consistent with the military decisional law which requires that courts must apply the mistake of fact defense with particularity to the element of proof at issue. For example, in *McFarlin*, when the Army Court of Military Review considered a charge of indecent assault, the court looked to the *mens rea* requirement in examining whether the accused could employ the mistake of fact defense to negate the element concerning the victim's lack of consent. The consent element of indecent assault, however, requires no special proof of the accused's *mens rea*. Accordingly, the court determined that for the mistake of fact defense to apply to the consent element, the accused's mistake must be honest and reasonable even though the charged offense of indecent assault is a special intent crime.

Put another way, just as specific intent crimes have general intent elements of proof, strict liability crimes likewise have general intent (and perhaps even special intent) elements of proof. For example, an accused charged with improper use of a countersign, a strict liability offense, presumably would be entitled to a mistake of fact defense if he honestly and reasonably believed that the information he was communicating was not a countersign.[71] Similarly, an accused charged with carnal knowledge presumably would be entitled to a mistake of fact defense if he honestly and reasonably believed that he was engaging in an activity other than sexual intercourse with the victim.[72] Finally, consider the case of a soldier who honestly and reasonably believes he is lawfully married to a fifteen-year-old female, but because of an administrative error by state authorities, his marriage is not valid under state law. Applying the rationale of *Adams*, this soldier would be guilty of carnal knowledge if he engaged in sexual intercourse with his putative wife. Such a result seems both unreasonable and inconsistent with the military's decisional authority, which recognizes that an honest and reasonable mistake as to marital status can be a defense to charges of bigamy,[73] falsifying official records, and submitting false claims.[74]

Professors Perkins and Boyce likewise have distinguished between mistake as to the female's age and mistake as to marital status with respect to carnal knowledge and bigamy.[75] These commentators observed that a mistake about a female's age is no defense to carnal knowledge, because "the courts, down through the ages, have explained that one intending to have illicit sexual intercourse has mens rea because he is purposely engaging in a wrongful act."[76] On the other hand, an honest and reasonable belief that one's marriage has terminated is a defense to bigamy, because "one contracting a marriage under such a belief would have no thought of wrongdoing."[77] Likewise, based upon the circumstances set forth in the providence inquiry in *Adams*, the accused in that case clearly had no thought of wrongdoing in either a criminal or a more generalized sense.[78]

Consequently, the courts should draw an important yet subtle distinction between a crime that proscribes conduct which also is socially intolerable or offensive, and a crime that proscribes conduct which, but for certain aggravating factors, is otherwise acceptable. For example,

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[68] *See id.*; State v. Randolph, 12 Wash. App. 138, 528 P.2d 1008 (1974) (and cases cited therein).

[69] *Carr*, 18 M.J. at 301 (stating "in accord with considerable precedent—... ignorance or misinformation as to the true age of the victim is no defense in a prosecution for carnal knowledge").

[70] *E.g.*, R. Everett, Military Justice in the Armed Forces of the United States 57 (1956); J. Snedeker, Military Justice Under the Uniform Code 815 (1953); Byler, *supra* note 41, at 8.

[71] *See* MCM, 1984, Part IV, para. 25c(4).

[72] *See, e.g.*, United States v. Booker, 25 M.J. 114, 116 (C.M.A. 1987). Although illustrative examples of the proposition in the accompanying text may seem far-fetched, one can draw a useful analogy to the so-called "doctor" cases that arise in the context of rape. *See id.* If a man consensually undergoes what he honestly and reasonably believes to be a medical procedure, but which is, in fact, an act of intercourse with an underage female, the law should entitle him to the mistake of fact defense. This result should obtain because the man's mistaken belief does not go to the true age of his partner, which is the only element of carnal knowledge having a strict liability standard.

[73] UCMJ art. 134; *see* United States v. Pruitt, 38 C.M.R. 236 (C.M.A. 1968).

[74] UCMJ art. 107; UCMJ art. 132; *see* United States v. Lawton, 19 M.J. 886 (A.C.M.R. 1985).

[75] Perkins & Boyce, *supra* note 10, at 917-18.

[76] *Id.* at 917.

[77] *Id.* at 918.

[78] *See supra* notes 38-44 and accompanying text.

although private, consensual fornication among unmarried persons is not criminal under the UCMJ absent other aggravating circumstances,[79] society traditionally has considered such conduct morally wrongful.[80] Therefore, the law places the burden of ensuring that the female is of sufficient age on the male actor to deter males from engaging in otherwise "wrongful" conduct with females under sixteen years of age. The accused in *Adams*, on the other hand, believed that he was engaging in consensual sexual intercourse with his wife. That conduct is not wrongful in either a criminal or moral sense; indeed, it enjoys constitutional protection.[81] As a consequence, the accused's conduct implies no criminal intent. This lack of criminal intent is significant because carnal knowledge is "not [a] strict-liability offense in the sense that an innocent and reasonable mistake would not be exculpating. [The law] merely take[s] the customary position that intentional misconduct may be so wrongful that the actor runs the risk of committing an unintended crime."[82] As another legal scholar has stated, "'Crimes such as ... carnal knowledge, seduction and the like, where the offense depends upon the girl's being below a designated age ... do require a *mens rea*,' although a reasonable mistake of fact as to her age is no defense."[83]

The court in *Adams* based its contrary conclusion on a purported legislative intent to disallow an honest and reasonable mistake, regarding all aspects of the female's identity as a defense to carnal knowledge. Nothing in the legislative history to article 120, however, suggests that Congress intended to expand the concept of strict liability for carnal knowledge uniquely under military law to include elements of proof other than the female's true age. Quite to the contrary, the military has sought to parallel civilian jurisdictions with respect to proscribing carnal knowledge and thus protecting young females.[84]

In support of its interpretation of Congress's intent, the court in *Adams* wrote that "in this special area of danger to a strong interest of society, pregnancy by unwed females younger than sixteen, Congress may impose the duty to be right; the duty of care to society is great."[85] The court's reasoning in recognizing an adult male's duty to be right, however, misses the point. If circumstances were as the accused honestly and reasonably believed them to be in *Adams*, the danger of an unwed mother giving birth would not arise because the accused's apparent partner would have been his wife. Society certainly has no less interest in deterring unwed motherhood in the context of bigamy or even rape,[86] yet an honest and reasonable mistake by the accused that he was married to his female sex partner would constitute a defense to both of these offenses.

Indeed, consistent with this reasoning in *Adams*, a soldier would not transgress the gravamen of carnal knowledge if he is "right" that his underage partner was sterile or not sufficiently mature to conceive a child. In such circumstances, however, the soldier would clearly be guilty of carnal knowledge, notwithstanding the fact that pregnancy outside of the marital union could not result. Guilt would lie, despite the female's inability to conceive, because the gravamen of carnal knowledge relates to protecting females of tender years from engaging in sexual intercourse, even if consensual, and not to protecting against unwed pregnancy.

Some courts have observed indelicately that society designed the deterrent purpose of the strict liability aspect of carnal knowledge to respond to the "predatory nature of man."[87] If that is true, then extending the strict liability standard of carnal knowledge to the marital status of the female vis-a-vis the accused is illogical, as society has no interest in protecting wives from being the sexual "quarry" of their husbands.

Having determined that mistake of fact is an available defense for negating the marital status element of carnal knowledge, all that remains is to determine the proper standard for the defense. As with other sex offenses having marital status as an element—such as rape, bigamy, and adultery—carnal knowledge requires no special *mens rea* element. General criminal intent, in other words, is sufficient for guilt. Accordingly, an accused charged with carnal knowledge, having both an honest and reasonable mistake as to the marital status of the female, is entitled to the mistake of fact defense.

Conclusion

Hornbook law specifies that conduct which includes two distinct matters constitutes a criminal offense: an act or omission (an *actus reus*), and a state of mind accompanying that act or omission (a *mens rea*).[88] The courts must take any steps to impose a strict liability standard for an offense, and thus diminish the significance of the actor's *mens rea*, with extreme circumspection.[89] Furthermore, courts must apply the strict liability standard in a manner that is clearly consistent with legislative intent.[90] The court's opinion in *Adams* satisfies neither of these important considerations.

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[79] *Hickson*, 22 M.J. at 150.

[80] *See generally* Perkins & Boyce, *supra* note 10, at 920. Given the changing societal attitudes toward sexual conduct, however, reexamination of the strict liability aspects of carnal knowledge under military law is, perhaps, appropriate. *See id.*; People v. Hernandez, 61 Cal. Rptr. 529, 393 P.2d 673 (1964); People v. Doyle, 16 Mich. App. 242, 167 N.W.2d 907 (1969).

[81] *See generally* Griswold v. Connecticut, 381 U.S. 479 (1965); United States v. Scoby, 5 M.J. 160, 165 (C.M.A. 1978).

[82] Perkins & Boyce, *supra* note 10, at 919.

[83] Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55, 73-74 (1933) (emphasis in original), *quoted in*, Perkins & Boyce, *supra* note 10, at 919.

[84] *See generally* Snedeker, *supra* note 54, at 815-16.

[85] *Adams*, 30 M.J. at 1037.

[86] *See* UCMJ art. 120. Under military law, an accused cannot rape his wife. *Id.*

[87] *E.g.*, State v. Superior Court of Pima County, 104 Ariz. 440, 443, 454 P.2d 982, 985 (1969).

[88] 1 LaFave & Scott, *supra* note 10, at § 1.2; *Mance*, 26 M.J. at 254 n.2 (stating that a *mens rea* must accompany the *actus reus*).

[89] *See generally* Byler, *supra* note 48, at 7-10.

[90] *See* State v. Randolph, 12 Wash. App. 138, 528 P.2d 1008 (1974)

Administrative Separation from the Military: A Due Process Analysis

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"Since you can't keep every single individual, it will be those who have the best qualities, those who have the best records who stay on."[1]

—Brigadier General Sherian G. Cadoria,
Total Army Personnel Command.

Introduction

Negotiations currently in progress between United States and Soviet arms control officials are leading toward dramatic reductions in military manpower. Although United States officials have stressed that many releases from active duty will involve voluntary separations instead of forced ones, the comment above reflects a growing consensus that the Army will reduce its force substantially, particularly through the involuntary separation of enlisted personnel.

Each year the Army administratively separates thousands of soldiers for misconduct, drug and alcohol abuse, and poor performance.[2] During the early phases of anticipated troop reductions, command policy will focus on the use of administrative procedures to separate involuntarily the "less desirable" soldiers from the more capable ones. This command policy provides the context for reviewing the case of *May v. Gray*.[3]

Congress has given the secretaries of the military departments broad authority to separate enlisted personnel administratively.[4] The specific grounds for separation and the procedures that commanders must follow appear in a Department of Defense directive.[5] The Secretary of the Army has implemented these provisions in one comprehensive regulation, Army Regulation 635-200.[6]

Army Regulation 635-200 provides a soldier facing separation with the right to a pretermination administrative hearing when he or she has a total of six or more years of military service, when the command is considering the soldier for discharge under other than honorable conditions, or when the command is separating the soldier for homosexuality.[7] In *May*, a case in which none of these conditions obtained, a United States District Court ruled that the procedural provisions of AR 635-200, as they applied to a separation for misconduct under chapter 14 of that regulation, violated the minimum constitutional requirements of due process. The court therefore ordered a pretermination hearing prior to the Army's discharging the soldier from the military service. One potential consequence of the *May* court's ruling may be the creation of a right to a predischarge hearing for every soldier undergoing involuntary separation—a requirement that would frustrate the military's ability to separate soldiers in a timely manner. This article examines the *May* court's analysis and discusses whether the provisions of the DOD Directive and AR 635-200 provide the minimum due process required by the fifth amendment to the United States Constitution.[8]

The *May* Decision

On April 11, 1988, Private First Class James W. May, Jr., participated in a random urinalysis at Fort Bragg, North Carolina. His commander later notified him that he had tested positive for marijuana. Subsequently, on May 11, 1988, May's commander initiated an administrative separation action against him pursuant to AR 635-200, chapter 14, which provides for the separation of soldiers for acts or patterns of misconduct.[9] Because PFC May

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[1] Stars and Stripes, Mar. 21, 1990, at 1, col. 1. Representative Les Aspin, D-Wis., Chairman of the House Armed Services Committee, has stated, "It is not going to be demobilization, but it certainly is going to be more accelerated than the type of gradual thing you are looking at. You are going to have to bring down the size of the Army a lot faster than 35,000 soldiers a year ... that is just flat not going to be adequate." Army Times, Mar. 19, 1990, at 15, col. 1 (quoting remarks made during session of House Armed Services Committee on March 5, 1990). General Carl Vuono, Chief of Staff of the Army, expressed his concerns: "We have stretched ourselves tremendously in this budget. The reductions are at the most rapid rate that will allow us to maintain ... capabilities while reshaping the Army. In my view more rapid reductions threaten to fracture the Army." Army Times, Mar. 19, 1990, at 15, col. 1 (quoting remarks made during session of House Armed Services Committee on March 5, 1990).

[2] For example, during Fiscal Year 1989, the Army administratively separated 8,991 soldiers because of misconduct. Thus far in Fiscal Year 1990, the Army has separated administratively 3,362 soldiers because of misconduct. Dep't of Army, START Report, DCSPER-46-II, p. 42 (Feb. 1990).

[3] 708 F. Supp. 716 (E.D.N.C. 1988).

[4] 10 U.S.C. § 1169 (1988).

[5] Dep't of Defense Directive 1322.14-R, Enlisted Administrative Separations (Jan. 28, 1982) [hereinafter DOD Directive].

[6] Army Reg. 635-200, Enlisted Personnel: Separations (15 Dec. 1988) [hereinafter AR 635-200]. AR 635-200 defines "administrative separation" as "discharge or release from active duty upon expiration of enlistment or required period of service, or before, as prescribed by the Department of the Army or by law." *Id.* at glossary. For purposes of this article, "administrative separation" will refer to involuntary separation prior to expiration of the enlistment term or required period of service.

[7] *Id.*, paras. 2-2*d*, 3-7*c*(4), 15-8*c*.

[8] U. S. Const. amend. V (stating, in part, "No person shall ... be deprived of life, liberty, or property, without due process of law").

[9] *See generally* AR 635-200, chap. 14.

had less than six years of total service in the military, and because his commander recommended that PFC May receive a general discharge,[10] the commander notified PFC May that he was not entitled to an administrative (pretermination) board. PFC May indicated that he intended to submit statements on his behalf by the deadline set by his commander, May 23, 1988, but he failed to submit these matters on time. His civilian attorney also requested a copy of the testing laboratory's "litigation packet"[11] by letter on that same date. The commander did not delay May's separation action pending receipt of the litigation packet, and the separation authority approved May's separation with a general discharge under honorable conditions on June 1, 1988.

On June 10, 1988, PFC May filed suit in the United States District Court for the Eastern District of North Carolina to enjoin his separation. The court granted a temporary restraining order, followed by a preliminary injunction. On December 6, 1988, following the Army's request for reconsideration, the court permanently enjoined the Army from separating PFC May prior to his Expiration of Term of Service (ETS) without first providing him with sufficient information to respond to the allegations. The court, in particular, determined that PFC May deserved the opportunity to review a copy of the litigation packet and that he had a right to a hearing.[12]

In addition to its holding that PFC May had a right to certain information and to a hearing prior to separation, the district court specifically found that: 1) PFC May had a limited property interest in his continued employment with the military; that is, he had a property interest in the remainder of his three-year tour of duty; 2) stigma attaches to the issuance of a general discharge under honorable conditions, thereby implicating a liberty interest; and 3) since the protection of liberty and property interests requires an opportunity to be heard prior to separation, an inquiry into the validity of AR 635-200 was appropriate because the regulation denies this right to soldiers who have served less than six years.[13]

The *May* decision is arguably distinguishable from most chapter 14 separations on two factual grounds. First, the court ruled that the Army failed to comply with its own regulations when it denied PFC May the opportunity to submit statements on his own behalf, even though he had denied the allegations verbally by the May 23 deadline and his attorney had made a request for documents by that date.[14] Second, the Army denied PFC May an opportunity to challenge substantively the urinalysis results because the command apparently neither provided him a copy of his urinalysis test results, nor gave him the opportunity to have his sample independently retested.[15]

Administrative Separation Procedures Under AR 635-200

Present regulations authorize three characterizations of service for administrative separation: honorable, general (under honorable conditions), and under other than honorable conditions.[16] A commander initiates and processes all involuntary separations under either a notification procedure or an administrative board procedure.[17] Which procedure the commander uses depends in part upon the specific basis for the separation and in part upon the least favorable separation and characterization of service that may result.

Commanders use the notification procedure in a majority of involuntary separation actions. When a commander initiates a separation action under this procedure, AR 635-200 entitles the soldier to written notification, an opportunity to consult with counsel, copies of documents that the separation authority will consider, and an opportunity to submit written statements in his or her own

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[10] While a discharge under other than honorable conditions is normally appropriate for a soldier discharged under chapter 14, the separation authority may direct a general discharge if warranted by the soldier's overall record. *Id.*, para. 14-3*a*.

[11] The litigation packet consists of the chain of custody documents, the official test report, the results of the analytical methodology, the qualifications of the lab personnel, and a description of the quality control/quality assurance system. Army Reg. 600-85, Alcohol and Drug Abuse Prevention and Control Program, para. 10-9 (21 Oct. 1988).

[12] *May*, 708 F. Supp. at 723.

[13] *Id.*

[14] AR 635-200, Interim Change 1, first authorized release of laboratory documents pursuant to a request by the soldier. Additionally, it clarified the rights waiver provisions of the regulation and permitted an extension of time to submit matters on the soldier's behalf. *See* AR 635-200 (IO1, 4 Aug. 1989).

[15] *May*, 708 F. Supp. at 722.

[16] AR 635-200, paras. 3-4 and 3-9. Uncharacterized separations include entry level status separation (generally during first 180 days of continuous active duty); order of release from the custody and control of the Army (by reason of void enlistment or induction); and separation by being dropped from the rolls of the Army.

[17] *Id.*, chap. 2.

behalf.[18] If the soldier has six or more years of total active and reserve military service, the notification procedure also entitles him or her to a pretermination hearing before an administrative separation board.[19]

When a commander initiates a separation action under the administrative board procedure, AR 635-200 entitles the respondent[20] to present his or her case to an administrative board regardless of the respondent's time in service.[21] The remainder of the procedures are similar to those in the notification procedure.[22]

If the commander initiates a separation action pursuant to AR 635-200, chapter 14, Separation for Misconduct, he or she may use the notification procedure if the respondent soldier has less than six years of total military service and if either an honorable or a general (under honorable conditions) discharge is warranted.[23] When a commander seeks a discharge under other than honorable conditions, however, he or she must initiate the separation action under the administrative board procedure.[24]

Due Process Analysis—Introduction

Both the fifth and fourteenth amendments to the United States Constitution prohibit the government from taking actions that would deprive any person of "life, liberty, or property without due process of law."[25] Procedural due process focuses on the "constitutional limits on judicial, executive, and administrative *enforcement* of the legislative dictates."[26] Briefly stated, the government must afford an individual the benefit of a certain amount of process before taking away a constitutionally protected interest. Procedural due process does not prohibit the deprivation of protected interests; it only requires that the government provide for a requisite process before a deprivation occurs.[27]

> Procedural due process guarantees only that there is a fair decision-making process before the government takes some action directly impairing a person's life, liberty or property. This aspect of due process does not protect against the use of arbitrary rules of law which are the basis of those proceedings. It is only necessary that a fair decision-making process be used; the ultimate rule to be enforced need not be a fair or just one.[28]

In determining whether the government has abided by the requirements of procedural due process, the courts employ a two-step analysis. First, the court must ask whether the individual has any right to due process. The law requires due process only if the government seeks to deprive someone of an interest expressly protected by the due process clause such as life, liberty, or property. Second, if the court finds that the government has infringed upon a protected interest, it then must decide how much process is due under the circumstances of the particular case.

The Right To Due Process—Property Interests

Since 1972, the definition of property has centered on the concept of "entitlement."[29] The Supreme Court will hold that an interest in a government benefit is constitutional "property" if the Constitution entitles a person to that benefit. Thus, a constitutional property interest in a benefit arises if an applicable federal, state, or local law that governs the dispensation of a benefit defines the interest in such a way that an individual should continue

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[18] *Id.*, chap. 2, sec. II.

[19] AR 635-200 entitles a soldier to a hearing if he or she had six or more years of total active and reserve service on the date of initiation of the recommendation for separation. AR 635-200, para. 2-2*d*.

[20] The "respondent" is a soldier whom the commander has notified that he has initiated action to separate him or her under AR 635-200.

[21] AR 635-200, chap. 2, sec. III.

[22] The administrative board procedure also entitles the respondent to obtain appointed counsel for representation, to request the attendance of any witnesses, to submit to examination by the board, to challenge voting members of the board, and to present argument before the board prior to its closing the case for deliberation. AR 635-200, para. 2-10*b*.

[23] *Id.*, para. 14-13.

[24] These procedures also pertain to separations under the provisions of AR 635-200, chapter 7 (fraudulent entry). Separation under AR 635-200, chapters 9 (alcohol or drug abuse) and 13 (unsatisfactory performance) authorize the administrative board procedure only when the soldier has six or more years of total time in service, because those chapters do not authorize a discharge under other than honorable conditions.

[25] U.S. Const. amends. V, IV. The fourteenth amendment's due process clause is applicable only to the states. District of Columbia v. Carter, 409 U.S. 418, 424 (1973).

[26] L. Tribe, American Constitutional Law 502 (1978) (emphasis in original).

[27] 2 J. Nowak, R. Rotunda, & J. Young, Constitutional Law 527 (1983) [hereinafter Constitutional Law].

[28] *Id.* at 417. *See generally* Rosen, *Thinking About Due Process*, The Army Lawyer, Mar. 1988, at 3.

[29] Board of Regents v. Roth, 408 U.S. 564 (1972).

to receive it under the terms of the law.[30] While property (and some liberty) interests originate in state law or contract, they are not automatic or "freestanding" human rights.[31]

> To have a property interest in a benefit, a person must clearly have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.... Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.[32]

One form of government benefit to which the Supreme Court has strictly applied the entitlement concept is public employment. The decisions in *Board of Regents v. Roth*[33] and *Perry v. Sindermann*[34] established that people may derive property rights in their continued employment from statutes, from explicit contracts, or from state declared policies.[35] Such property rights must, however, have some identifiable source; they cannot emanate from "mere subjective expectancy."[36]

The employment status of a government worker generally will fall into one of two categories: 1) employment that the government may terminate at will or 2) employment that the government may terminate only for cause. An employee who is terminable at will has no property interest because no objective basis exists for him to believe that the government will continue to employ him indefinitely. An employee who is terminable for cause, however, can expect to remain employed unless he does something that warrants termination.[37]

As a general rule, no statutes or regulations exist that create property interests in military service or any of its accompanying accoutrements.[38] Courts have held that a person has no property interest in enlistment in the military,[39] in commissions,[40] in promotions,[41] or in commands or assignments.[42] The decisions addressing the issue of property interests in continued military service have focused on the provisions of title 10, United States Code, that deal with the discharge of military members. Under 10 U.S.C. § 681, reservists serve at the pleasure of the Secretary concerned.[43] Under 10 U.S.C. § 1162, reserve officers serve at the pleasure of the President.[44] The courts uniformly have held that these statutes provide no constitutional entitlement to continued military service on active duty[45] or in the reserves.[46] "One who may be discharged 'at the pleasure' of another, i.e., arbitrarily, for no cause whatsoever, simply has no property right to continued employment."[47]

The *May* court distinguished the property rights of reservists and officers from those of enlisted personnel based upon the difference between the languages that Congress used in the title 10 provisions that apply to officers and reservists, and the title 10 provision that apply to enlisted soldiers. While the former categories of service members serve expressly at the pleasure of the

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[30] Constitutional Law, *supra* note 27, at 547.

[31] Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 Cornell L. Rev. 445, 454 (1977).

[32] *Roth*, 408 U.S. at 577.

[33] *Id.*

[34] 408 U.S. 593 (1972).

[35] Coppedge v. Marsh, 532 F. Supp. 423, 428 (D. Kan. 1982) (quoting Perry v. Sindermann, 408 U.S. 593, 603 (1972)).

[36] *Perry*, 408 U.S. at 603.

[37] Hall v. Ford, 856 F.2d 255, 265 (D.C. Cir. 1988).

[38] *But see* Berg v. Claytor, 436 F. Supp. 76, 81 (D.D.C. 1977) (courts must recognize expectation of continued employment as protected property right); Suro v. Padilla, 441 F. Supp. 14, 17 (D.P.R. 1976) (to hold that officers have no property interests would be inconsistent with spirit of Constitution and would undermine reasonable expectations of members of armed forces).

[39] *See, e.g.*, Lindenau v. Alexander, 663 F.2d 68 (10th Cir. 1981); Shaw v. Gwatney, 584 F. Supp. 1357, 1361 (E.D. Ark. 1984), *aff'd in part, vacated in part*, 795 F.2d 1351 (8th Cir. 1986); Gant v. Binder, 596 F. Supp. 757, 767 (D. Neb. 1984), *aff'd*, 766 F.2d 358 (8th Cir. 1985).

[40] *See, e.g.*, Orloff v. Willoughby, 345 U.S. 83 (1953).

[41] *See, e.g.*, Blevins v. Orr, 721 F.2d 1419 (D.C. Cir. 1983); Diliberti v. Brown, 583 F.2d 950 (7th Cir. 1978).

[42] *See, e.g.*, Arnheiter v. Chafee, 435 F.2d 691 (9th Cir. 1970).

[43] "Except as otherwise provided in this title, the Secretary concerned may at any time release a Reserve under his jurisdiction from active duty." 10 U.S.C. 681 (1988).

[44] "Subject to other provisions of this title, reserve commissioned officers may be discharged at the pleasure of the President." 10 U.S.C. § 1162 (1988).

[45] *See* Knehans v. Alexander, 566 F.2d 312, 314 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 995 (1978); Pauls v. Secretary of Air Force, 457 F.2d 294 (1st Cir. 1972); *Shaw*, 584 F. Supp. at 1361.

[46] Alberico v. United States, 783 F.2d 1024 (Fed Cir. 1986); Ampleman v. Schlesinger, 534 F.2d 825 (8th Cir. 1976); Sims v. Fox, 505 F.2d 857 (5th Cir. 1974) (en banc), *cert. denied*, 421 U.S. 1011 (1975); BenShalom v. Secretary of Army, 489 F. Supp. 964, 971 (E.D. Wis. 1980).

[47] *Sims*, 505 F.2d at 860.

President or the Secretary concerned, 10 U.S.C. § 1169 provides that,

> No regular enlisted member of an armed force may be discharged before his term of service expires, except—
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> (1) as prescribed by the Secretary concerned;
>
> (2) by sentence of a general or special court-martial; or
>
> (3) as otherwise provided by law.[48]

Based on this language, the *May* court ruled that section 1169 grants an enlisted soldier a legitimate claim of entitlement to his job.

The *May* case certainly is not the first case in which a court has examined statutory language to determine if a property interest exists in continued public employment. The Supreme Court addressed the same issue with respect to a state statute in *Cleveland Board of Education v. Loudermill*.[49] In that case, the Court examined an Ohio statute that allowed for the discharge of a state civil service employee only for misfeasance, malfeasance, or nonfeasance in office. The Court concluded that the Ohio statute expressly allowed termination only for cause. Accordingly, the Court held that the statute provided the employee with a legitimate property right and that the fifth amendment protected his interest in continued employment by the state.[50]

Unlike the Ohio legislature, however, Congress has not set any express limitation upon the Secretary's authority to prescribe the conditions and procedures under which the Army may discharge enlisted personnel. Clearly 10 U.S.C. § 1169 contains no provision limiting discharge for reasons of "cause" or "misfeasance." Because active duty enlisted soldiers effectively serve at the discretion of the Secretary concerned, depending upon the standards he prescribes, their employment in the armed forces effectively is terminable at will. Therefore, the status of enlisted members is comparable to their reserve enlisted and officer counterparts inasmuch as "cause" is not a statutory criterion for dismissal.[51] Consequently, the absence of limiting provisions in section 1169, should prevent the courts from relying upon the language of that statute to establish that an enlisted soldier has a property interest in his or her continued employment.[52]

The decision of the United States Court of Appeals for the District of Columbia Circuit in *Gay Veterans Association v. Secretary of Defense*[53] was the sole authority cited by the *May* court in support of its finding of a limited property interest in an enlisted soldier's continued employment in the military service. The *Gay Veterans Association* case, however, addressed only the authority of the Department of Defense to characterize administrative discharges. The District of Columbia Circuit's language concerning the existence of property and liberty interests in continued military service was merely dictum that did not constitute binding authority in support of the *May* court's interpretation of section 1169.

In addition to their derivation from statutes, property interests also can arise from contracts.[54] One court has ruled specifically that the enlistment agreement and oath of enlistment negate any soldier's claim that he has a protected property interest in his retention in the armed service.[55] In other words, the contents of an enlistment agreement, if one considers them as terms of an employment arrangement with the government, are insufficient to implicate a contractual property interest that is cognizable under the concept of due process.

As the Supreme Court indicated in *Perry*, however, the terms of an employment arrangement actually may confer a property interest.[56] "Property interests can result from implied agreements or statutory or administrative procedures governing nonrenewal."[57] Thus, even though

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[48] 10 U.S.C. § 1169 (1988).

[49] 470 U.S. 532 (1985).

[50] *Id.* at 534.

[51] Chilcott v. Orr, 747 F.2d 29, 34 (1st Cir. 1984).

[52] *See* Rich v. Secretary of the Army, 735 F.2d 1220, 1226 (10th Cir. 1984); Garrow v. Gramm, 856 F.2d 203, 206 (D.C. Cir. 1988).

[53] 668 F. Supp. 11, 14 (D.D.C. 1987), *aff'd*, 850 F.2d 764 (D.C. Cir. 1988) ("... accepting plaintiff's assertion that separation from the military accompanied by a less-than-honorable discharge characterization hinders civilian employment opportunities, thereby infringing on constitutionally protected liberty and property interests ...").

[54] *Loudermill*, 470 U.S. at 545; Rew v. Ward, 402 F. Supp. 331, 338-39 (D.N.M. 1975).

[55] *Loudermill*, 470 U.S. at 545.

[56] *Perry*, 408 U.S. at 603.

[57] Weathers v. West Yuma County School Dist. R-J-1, 530 F.2d 1335, 1337 (10th Cir. 1976). *See generally* Paige v. Harris, 584 F.2d 178 (7th Cir. 1978); Ashton v. Civiletti, 613 F.2d 923 (D.C. Cir. 1979).

an enlistment agreement apparently would not meet the contractual threshold to implicate a property interest, a property interest nevertheless may inure to a soldier's benefit based upon rules or regulations promulgated by the military branches under which the soldier serves. For example, when the Army fails to comply with its own regulations in discharging a soldier, a property interest may accrue to that soldier's benefit.[58] Although not specifically addressed in *May*, the Army's failure to provide PFC May with the opportunity to submit statements in his own behalf or to challenge the urinalysis results could have sustained a finding that a limited property interest accrued. In the absence of case-specific facts, however, the provisions of section 1169 and case law strongly imply that enlisted soldiers enjoy no greater right to a constitutionally protected property interest in continued military service than do reservists or reserve officers.

The Right to Due Process—Liberty Interests

The United States Supreme Court defined the meaning of "liberty" in *Board of Regents v. Roth* as follows:

> [Liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience and generally to enjoy those privileges long recognized ... as essential to the orderly pursuit of happiness by free men.[59]

The Court was careful to note that it could not categorize all areas of human activity as "liberties" in constitutional terms and that government action could have an adverse effect on individuals in some situations without granting any substantive or procedural guarantees.[60]

The Supreme Court held, however, that when the government acts as an employer, special issues arise regarding the existence of liberty rights in employment. Dismissal from a specific position does not amount to a loss of "liberty," because the Court has held that the foreclosing an individual's *government* employment does not necessarily constitute a deprivation of freedom.[61] If, on the other hand, in dismissing an employee the government also forecloses that individual's possible employment in a wide range of activities in both the public and private sectors, that action will constitute a deprivation of liberty sufficient to require the government to grant the individual a fair hearing.[62] For example, if the government discharges a person from a position for announced reasons of incompetence or other traits that would tend to foreclose a wide range of future employment opportunities, procedural due process will entitle that individual to a hearing so that he will have the opportunity to contest the basis for the charges and to clear his reputations.[63] A government employee has the right to contest the truth of information that the government will release concerning him if the government's action will limit his associational or employment opportunities.[64]

In the case of the government's firing or failing to rehire one of its employees, the government's action will implicate a liberty interest if either 1) the individual's good name, reputation, honor, or integrity are at stake by charges such as immorality, dishonesty, alcoholism, disloyalty, communism, or subversive acts, or 2) the government's action could impose a stigma or other disability on the individual that forecloses other employment opportunities.[65]

One of the most common forms of liberty implicated by administrative decisions—especially those entailing personnel actions—is the imposition of a stigma on an individual. Not all government actions that may stigmatize, however, necessarily give rise to an infringement of a liberty interest under the due process clause. Rather, four other conditions also must be present: 1) the action must involve information that actually is stigmatizing; 2) the stigmatizing information must affect a cognizable property interest; 3) the government must disseminate the stigmatizing information outside of the agency in which it originated; and 4) the government must be the party responsible for disseminating the stigmatizing information.[66]

First, the information that the individual claims to implicate a liberty interest actually must be stigmatizing.[67] In the case of a service member, a stigma may attach to a soldier's discharge either from the characterization of the discharge, or from the reasons recorded for

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[58] *Rich*, 735 F.2d at 1226; *Shaw* 584 F. Supp. at 1361.

[59] *Perry*, 408 U.S. at 572 (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

[60] *Perry*, 408 U.S. at 569-70.

[61] *Id.* at 575.

[62] Constitutional Law, *supra* note 27, at 543.

[63] Codd v. Velger, 429 U.S. 624 (1977) (per curiam).

[64] *Id.*

[65] Perry v. FBI, 781 F.2d 1294, 1300 (7th Cir. 1986).

[66] Actually, five conditions must be present to give rise to a liberty interest; the fifth—that the stigmatizing information be false—is not relevant to this discussion.

[67] *See, e.g.*, Elliott v. Hinds, 786 F.2d 298 (7th Cir. 1986); Boston v. Webb, 783 F.2d 1163 (4th Cir. 1986).

the discharge if the reasons present a "derogatory connotation to the public at large."[68] One court has held that involuntary separation from military service with an honorable discharge, the most favorable characterization of service available to a soldier, absent something more, does not infringe on a constitutionally protected liberty interest.[69] Other cases have held, however, that even an honorable discharge can impose a stigma foreclosing a former soldier from taking advantage of other employment opportunities.[70] These courts found by examining the discharge certificate[71] that, although the character of service appeared as "honorable," the DD Form 214 annotates the authority and reason for discharge in a "Separation Program Designator" (SPD) code that allegedly stigmatized the term of service of the former soldier in the eyes of prospective employers.[72]

Separation program designator codes are three-figure computer codes representing the reasons for separation, as set out in the Department of Defense officer and enlisted separation regulations.[73] The Department of Defense uses SPD codes to provide a statistical accounting of the reasons for which the services separate active duty personnel.[74] The appendix to AR 635-5-1 contains a list of SPD codes and the reasons for separation.[75] Government authorities may not release these codes to any agency or person outside of the Department of Defense without the permission of the agency concerned.[76] Furthermore, government authorities will explain an SPD to a former soldier or his designated representative only upon receipt of a written request from the former soldier.[77] Finally, the Department of the Army taken measures to control the release of SPD codes by marking AR 635-5-1 "For Official Use Only" (FOUO), and by limiting the regulation's distribution to Department of Defense agencies.[78]

The SPD code appears on the portion of the discharge certificate marked "Special Additional Information," which is located at the bottom of the DD Form 214.[79] The SPD code appears only on copies 2, 4, 7, and 8 of the form.[80] The soldier receives copy 1 upon discharge.[81] The soldier also may receive copy 4, which contains the SPD information, but the soldier must specifically request it.[82] If the soldier has supplied an authorization to furnish a copy of the DD Form 214 to another group or individual, the regulation requires that the agency ensure that the copy furnished does not contain the special additional information section containing the SPD code.[83] However, because the SPD code lists the specific reason for discharge (for example, JKM—misconduct—pattern of misconduct), that information, if made available to the public, could be stigmatizing because it could present a "derogatory connotation to the public at large."[84]

Stigma also may attach to a soldier's discharge based upon the characterization of service. The general discharge, frequently issued in misconduct separations, is a less favorable discharge than an honorable discharge because it is merely a "separation from the Army under honorable conditions. When authorized, it is issued to a soldier whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge."[85] No court has addressed whether a general discharge, without more, imposes a stigma affecting liberty interests. Cases discussing the necessity of "irreparable harm" for injunctive relief have, however, distinguished the general from the honorable discharge. Because the vast majority of soldiers receive honorable discharges, these courts have held that a general discharge severely stigmatizes its recipient and significantly disadvantages him in the job market, resulting in suffi-

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[68] Casey v. United States, 8 Cl. Ct. 234, 241 (1985) (quoting Birt v. United States, 180 Ct. Cl. 910, 914 (1967)); *see also* Simmons v. Brown, 497 F. Supp. 173, 179 (D. Md. 1980).

[69] *Knehans*, 566 F.2d at 314 (honorable discharge does not impinge upon interest in reputation, especially when Army does not publicly disseminate reasons for nonpromotion).

[70] *Rew*, 402 F. Supp. at 338; *Casey*, 8 Cl. Ct. at 241.

[71] Dep't of Defense, Form 214, Discharge Certificate [hereinafter DD Form 214].

[72] *Casey*, 8 Cl. Ct. at 242.

[73] *E.g.*, Army Reg. 635-5-1, Personnel Separations: Separation Program Designators (1 Oct. 1982) [hereinafter AR 635-5-1].

[74] *Id.*, para. 5*a*.

[75] *See id.* at appendix.

[76] *Id.*, para. 5*b*.

[77] *Id.*, para. 5*d*.

[78] *Id.* at cover.

[79] *Id.*, para. 5*c*.

[80] Army Reg. 635-5, Personnel Separations: Separation Documents, table 2-1 (1 Oct. 1979) (C1, 1 Aug. 1981) [hereinafter AR 635-5 (C1, 1981)].

[81] *Id.*

[82] *Id.*, paras. 2-1*c*, 2-1*d*.

[83] *Id.*, para. 2-6*d*.

[84] *Casey*, 8 Cl. Ct. at 241; *Birt*, 180 Ct. Cl. at 914.

[85] AR 635-200, para. 3-7*b*.

cient "irreparable harm" to justify injunctive relief.[86] These analogous rulings strongly imply that the receipt of a general discharge actually is stigmatizing. Complicating matters further is the notification provided to soldiers pending administrative separation, which requires the soldier to acknowledge that "I understand that I may expect to encounter substantial prejudice in civilian life if a general discharge under honorable conditions is issued to me."[87] Thus, the Army itself appears to recognize the derogatory connotation that the general discharge presents to the public at large.

The second prerequisite for implicating a liberty interest is that the stigma must affect access to a tangible interest.[88] In the case of an adverse personnel action, a stigma that forecloses the freedom to take advantage of other employment opportunities generally will be sufficient to trigger constitutional due process requirements.[89] The stigma, however, must be formal and substantial. The Supreme Court noted in *Roth* that "[m]ere proof, for example, that his record of nonretention in one job, taken alone, might make him somewhat less attractive to some other employers would hardly establish the kind of foreclosure of opportunities amounting to a deprivation of 'liberty.'"[90] Moreover, the stigma must be "something considerably graver than a charge of failure to perform a particular job, lying within the employee's power to correct."[91] Again, in the case of a service member, the issuance of either a general discharge or an honorable discharge with derogatory SPD information relating to misconduct apparently would be sufficiently adverse, and may be sufficiently beyond a soldier's ability to correct, to satisfy the *Roth* Court's definition of "stigma."

The third and fourth requirements for implicating a liberty interest are interrelated. Dissemination of the stigmatizing information must have occurred,[92] and the government must have been responsible for the dissemination.[93] Absent actual dissemination to the public or to prospective employers, the mere existence of stigmatizing information does not jeopardize future employment opportunities. For example, the mere presence of stigmatizing information in confidential agency files does not implicate a liberty interest.[94] To prevent the implication of a liberty interest and to protect people's privacy interests, government departments take certain measures to ensure that such confidential information does not go beyond agency files. For instance, AR 635-5 and AR 636-5-1 direct that the copy of the discharge certificate provided to the soldier will not indicate the SPD code; furthermore, prospective employers can only obtain access to the SPD information with the soldier's written consent.[95] The *May* court believed, however, that the realities of the market place were such that "[o]ne who is seeking employment and is asked to furnish background information and verification is hardly in a position to refuse the request if he wants the job."[96] Another court, in response to arguments that the coded designators on the discharge certificate are private information and not known or understood by the public at large, flatly stated that "military separation codes are known, understood and available to the part of society that counts—i.e., prospective employers."[97]

The Supreme Court touched on the issue of the public's knowledge concerning the significance of a discharge's characterization in *Bishop v. Wood*.[98] Justice Brennan commented in his dissenting opinion that "[t]here is no reason to believe that [the government] will not convey these actual reasons [for discharge] to petitioner's prospective employers."[99] In a footnote Justice Brennan added "[i]t is only common sense, to be

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[86] *Chilcott*, 747 F.2d at 31; Correa v. Clayton, 563 F.2d 396, 399 (9th Cir. 1977); Bland v. Connally, 293 F.2d 852, 853 n.1 (D.C. Cir. 1961); Kalista v. Secretary of Navy, 560 F. Supp. 608, 610 n.1 (D. Colo. 1983); Stapp v. Resor, 314 F. Supp. 475, 478 (S.D.N.Y. 1970); Sofranoff v. United States, 165 Ct. Cl. 470 (1964).

[87] AR 635-200, fig. 2-5.

[88] Paul v. Davis, 424 U.S. 693 (1976).

[89] *Id.* at 701; *Roth*, 408 U.S. at 593.

[90] *Roth*, 408 U.S. at 574 n.13.

[91] Russell v. Hodges, 470 F.2d 212, 217 (2d Cir. 1972); *see* Sullivan v. Stark, 808 F.2d 737, 739 (10th Cir. 1987); Walker v. United States, 744 F.2d 67, 69 (10th Cir. 1984); Schwartz v. Thompson, 497 F.2d 430, 432 (2d Cir. 1974).

[92] Bishop v. Wood, 426 U.S. 341 (1976).

[93] Schlay v. Montgomery, 802 F.2d 918 (7th Cir. 1986); *Rich*, 735 F.2d at 1222.

[94] *Sims*, 505 F.2d at 861.

[95] AR 635-5-1, para 5*d*.

[96] *May*, 708 F. Supp. at 722.

[97] *Casey*, 8 Cl. Ct. at 243; *see also Rew*, 402 F. Supp. at 341 ("When an employer knows someone has been in the service, they will either ask the separatee to furnish a copy of the narrative summary or have her sign a routine waiver allowing the company to get the summary.").

[98] 426 U.S. 341 (1976).

[99] *Id.* at 352.

sure, that prospective employers will inquire as to petitioner's employment during the 33 months in which he was in respondent's service."[100] The majority in *Bishop* responded by stating that "unless we were to adopt Mr. Justice Brennan's remarkably innovative suggestion ... that almost every discharge implicates a constitutionally protected liberty interest, the ultimate control of state personnel relationships is, and will remain, with the states."[101] More recently, the United States Court of Appeals for the Tenth Circuit addressed Justice Brennan's concerns regarding the release of information by a former employer (the Army) in *Rich v. Secretary of the Army*:

> [T]o the extent that the Army publicized any information to the public or the State of Colorado, it was at the behest of the plaintiff. Plaintiff consented to the release of such material. After inducing the Army to release information, plaintiff cannot now claim that this impaired a liberty interest.[102]

The *Rich* and *Bishop* cases were limited, however, to situations in which the service issued an *honorable* discharge. Even if the government does not make public the specific reason for discharge, the mere issuance of a general discharge certificate arguably imposes a stigma that forecloses other employment opportunities, thereby implicating a liberty interest and invoking due process protection.

What Process Is Due

When a court finds that the government has deprived an individual of a liberty or property interest, the next question it must resolve is what process is constitutionally due.[103] The Supreme Court's ruling in *Loudermill* provides guidance in the area of pretermination hearings.[104] In *Loudermill* the Court determined the need for some form of pretermination hearing in which the employee receives notice and an opportunity to respond. The opportunity to respond need not be elaborate, and something less than a full evidentiary hearing is sufficient prior to adverse administrative action.[105] The purpose of the pretermination hearing is not to "definitively resolve the propriety of the discharge," as would be the case at a later formal hearing, but rather, it is "an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action."[106]

The *Loudermill* Court went on to explain that procedural due process entitles a tenured government employee to oral and written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.[107] The Court emphasized, however, that "[t]o require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee."[108] The majority in *Loudermill* deliberately chose not to include within its definition of pretermination hearing rights the panoply of trial-type hearing rights advocated by Justice Marshall in his concurring opinion, which included a full evidentiary, adversarial, adjudicatory hearing with an impartial judge.[109] The *Loudermill* Court noted that "all the process that is due is provided by a pretermination opportunity to respond, coupled with post-termination administrative procedures as provided by Ohio statute."[110] Accordingly, the Court's holding in *Loudermill* rested in part upon the provisions in Ohio law for a full post-termination hearing.[111] Those provisions included hearings before a referee and the State Civil Service Commission, requirements for findings of fact and conclusions of law, and the opportunity to obtain representation and witnesses.[112]

Like the Ohio statute examined in *Loudermill*, most Army regulations afford soldiers due process prior to the imposition of an adverse personnel action. An involuntary separation under the provisions of AR 635-200 is no exception. Once the separation authority approves a dis-

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[100] *Id.* at 352 n.2.

[101] *Id.* at 349 n.14.

[102] 735 F.2d 1220, 1227 (10th Cir. 1984); *see also Sims*, 505 F.2d at 863 (Air Force regulations provided that employers could not learn of circumstances of discharge; in absence of allegations indicating a reasonable likelihood that Air Force would reveal plaintiff's records to potential employers, complaint was purely speculative).

[103] Morissey v. Brewer, 408 U.S. 471, 481 (1972). Note that if statutes or regulations provide process even though an individual has not suffered the deprivation of a constitutionally protected interest, the agency still must follow statutory or regulatory procedures. Vitarelli v. Seaton, 359 U.S. 535 (1959). Furthermore, if process is constitutionally required and statutes or regulations provide process, the courts will assess independently the adequacy of the process provided, even if the same statutes or regulations created the property or liberty interest at stake. *Loudermill*, 470 U.S. at 535.

[104] *Loudermill*, 470 U.S. 535.

[105] *Id.* at 545 (citing Matthews v. Eldridge, 424 U.S. 319, 343 (1976)).

[106] *Loudermill*, 470 U.S. at 545-46.

[107] *Id.* at 546.

[108] *Id.*

[109] *Id.* at 548 (Marshall, J., concurring in part and concurring in the judgment).

[110] *Id.* at 547-48.

[111] *Id.* at 546, 547 n.12.

[112] *Id.* at 535-36.

charge, the affected soldier has recourse before two post-termination administrative boards. The Army Discharge Review Board (ADRB) reviews applications for relief by soldiers discharged administratively.[113] The ADRB has the authority to change a soldier's discharge or issue a new discharge, but it cannot revoke the discharge. The applicant has the right to appear before the board in person, to retain counsel for representation, and to present witnesses.[114] Review by the Secretary of the Army is discretionary. The Army Board for the Correction of Military Records (ABCMR) considers applications for relief and makes recommendations to the Secretary of the Army.[115] A hearing before the ABCMR is discretionary; if granted, however, the applicant may appear with counsel and present witnesses.[116] On the ABCMR's recommendation, the Secretary may reinstate a discharged applicant and award back pay and other pecuniary benefits.

The amount of post-termination due process that the government must afford will vary according to the type of interest affected.[117] When only a liberty interest is at stake, procedural due process entitles an employee to a hearing so that the employee will have the opportunity to clear his or her name.[118] The hearing, however, will not address the correctness of a particular course of action and has no effect on the underlying decision to terminate the employee.[119] Several courts have stated that these so-called "name-clearing" hearings should provide notice of the charges and an opportunity to refute, by cross-examination or independent evidence, the allegations giving rise to the reputational injury.[120]

The ADRB, which has the authority to upgrade a discharge and thus address any potential injury to reputation, provides soldiers with the requisite degree of due process required by the "name-clearing" hearing. However, when the government action affects a property interest, it can justify its action only if the government had "cause" to terminate.[121] Consequently, a post-termination hearing in such cases must consider reinstatement by further examining the correctness of the controverted course of action. In the case of a service member's termination, the hearing would have to consider the propriety of the underlying decision to separate the soldier. The due process required for a hearing under these circumstances would include an adversarial evidentiary proceeding before a board with the authority to order reinstatement.[122] However, as noted earlier, the administrative body with the authority to grant such relief—the ABCMR—provides such hearings only at its discretion. In view of *Loudermill*, the Army's failure to guarantee a post-termination hearing in cases in which the government's action has implicated a property interest may render the process constitutionally deficient. Thus, the *May* court's ruling that procedural due process entitled PFC May to a full, pretermination hearing may have been correct in his particular case, even though the court based its decision upon faulty legal analysis.

Conclusion

How will the *May* decision impact on respondents facing separation from the Army under AR 635-200? A limited property interest may accrue to respondents when the Army fails to comply with its own regulations, such as when PFC May's commanders denied him the opportunity to submit statements on his own behalf and to conduct independent testing of his urine sample. Due process also requires the Army to give the soldier notice of the reasons for separation and a hearing. *Loudermill* established that a pretermination hearing is not necessary when the government affords notice and an opportunity to respond through adequate post-termination procedures. Unfortunately, the discretionary nature of the due process afforded by ABCMR—the board with authority

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[113] 10 U.S.C. § 1553 (1988).

[114] 10 U.S.C. § 1553c (1988).

[115] 10 U.S.C. § 1552 (1988).

[116] 10 U.S.C. § 1552 (1988); Reed v. Franke, 187 F. Supp. 905 (E.D. Va. 1960), *aff'd*, 297 F.2d 17 (4th Cir. 1961); Armstrong v. United States, 205 Ct. Cl. 754 (1974). If the ABCMR grants a hearing, the Secretary of the Army has the discretion to determine the scope of review. 10 U.S.C. § 1552 (1988).

[117] Amos Treat & Co. v. SEC, 306 F.2d 260, 263 (D.C. Cir. 1962).

[118] *Codd*, 429 U.S. at 627; *see* Doe v. Department of Justice, 753 F.2d 1092, 1102 (D.C. Cir. 1985).

[119] *Doe*, 753 F.2d at 1102.

[120] *Lyons*, 851 F.2d at 411; *Walker*, 744 F.2d at 70.

[121] *See Lyons*, 851 F.2d at 411.

[122] *See Loudermill*, 470 U.S. at 545.

to reinstate a soldier—does not rise to the level contemplated by *Loudermill* and its progeny. In these situations, defense counsel should argue that a full, adversarial, pretermination hearing, through the use of the administrative board procedure, is the only means by which the command can afford adequate process to the soldier.

However, when the Army implicates only a liberty interest, whether through the issuance of an honorable discharge containing derogatory SPD information or through the issuance of a general discharge, the "name-clearing" process afforded by the ADRB appears to comply with the minimum due process requirements established by the case law. Except for situations in which a soldier has six or more years of service, is subject to an under other than honorable conditions characterization of service, or is facing separation for homosexuality, procedural due process would not entitle the soldier to an adversarial pretermination hearing. Thus, the value of the *May* decision apparently is limited to those cases in which the Army violates its own rules and procedures.

Finally, one must consider the unique nature of the military and the importance of the interests involved. The Supreme Court consistently has recognized the essential requirement of military discipline and the exigent circumstances that make presidential and command discretion necessary.[123] Accordingly, precedent counsels that Congress and the courts must grant the military wide latitude in fashioning disciplinary mechanisms such as the administrative discharge regulations. The importance of the interests involved and the nature of the subsequent proceedings may provide sufficient constitutional justification for the limited pretermination and post-termination hearings afforded when the Army's actions implicate a soldier's property interest in continued military service.

[123] *See, e.g.*, Chappell v. Wallace, 462 U.S. 296, 300 (1983) (recognizing need for special regulations in relation to military discipline); Schlesinger v. Councilman, 420 U.S. 738, 757 (1975); *Orloff*, 345 U.S. at 94.

Construction Contract Bonds—A Primer

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In the construction industry, business is sporadic, fixed assets are limited, and the contractor often mobilizes its labor force, material, and equipment on an ad hoc basis. As a measure of protection against incompetence or insolvency, the government requires contractors to furnish bonds or other acceptable guarantees for the government's benefit, as well as for the benefit of parties who provide labor or material on federal projects. This article is a primer for contracting officers and legal advisors tasked with reviewing bonds and administering bonded construction contracts. It consists of two main sections: 1) bid guarantees; and 2) performance and payment bonds.[1] Each section opens with an overview of the development of the bond requirement and follows with a discussion of problems and issues unique to that particular bond.

Bid Guarantees

As a general rule, in sealed bidding acquisitions, bidders may not withdraw their offers after the time set for bid opening.[2] The government considers an offer firm for the period set forth in the solicitation, which is normally sixty days.[3] The bid guarantee is a form of security that assures that a bidder will not withdraw its bid within this period. This guarantee also protects the government from losing the benefit of its bargain if the low bidder is unable to, or refuses to, furnish the performance and payment bonds required by the solicitation.[4] Although an offeror still remains liable to the government if it fails to execute the contract,[5] recourse to the surety provides a more certain and expeditious means of recovery.[6]

Contracting officers long have required offerors to furnish bid guarantees. The case of *Haldane v. United States*

[1] This article does not address the Capehart Act bond requirement, which is limited to military housing projects. *See* 42 U.S.C. § 1594(a).

[2] Fed. Acquisition Reg. 52.214-7(g) [hereinafter FAR]. For some exceptions, see FAR 14.304 and 14.406-3. In negotiated acquisitions, an offeror may withdraw a proposal anytime before award. FAR 52.215-10(h).

[3] FAR 52.214-15; 52.215-19; Defense Fed. Acquisition Reg. Suppl. 252.228-7007(c) [hereinafter DFARS]. *See* Williams Services, Inc., Comp. Gen. Dec. B-225041 (29 Oct. 1986), 86-2 CPD ¶ 494.

[4] FAR 28.001.

[5] FAR 52.249-10; *see* Dry Roof Corp., ASBCA No. 29061, 88-3 BCA ¶ 21,096. The contractor is liable for the difference in price between its bid and the bid that the government ultimately accepts to procure the same work. The contractor is also liable for the administrative costs of the reprocurement.

[6] R. Rumizen and M. Socolar, *Bid Guarantees in Federal Procurement*, 18 Mil. L. Rev. 99, 100 (1962).

is illustrative.[7] In 1890, the United States advertised for the delivery and stacking of five million pounds of hay and one million pounds of straw for Fort Riley, Kansas. The solicitation instructed offerors that the government would not entertain bids unless accompanied by a "guaranty having justification in the amount of not less than 10 per centum of the total consideration" of the bid.[8] The government also advised offerors that if the contracting officer accepted their bid, they would have to execute the contract and obtain a performance bond or be liable for the difference in price between their bid and that of any eventual awardee.[9]

The regulations and Government Accounting Office (GAO) opinions in this area have undergone significant evolution and reform. For many years, even if a low bidder failed to furnish a bid guarantee with its offer, the contracting officer could treat the defect as a minor irregularity.[10] Early decisions focused on the cost benefit of awarding to the low bidder despite its failure to include a bid guarantee with its offer.[11] Later, the government allowed waiver only if the failure to provide a guarantee was inadvertent and not due to the financial inability of the bidder to provide it.[12] In 1959, however, the GAO tightened the reins on past practice, holding that, subject to the late bid rules,[13] a bid would be nonresponsive if not accompanied by an enforceable bid guarantee.[14] The GAO no longer was concerned with cost savings, but instead found a need to protect the integrity of the competitive bidding system. The GAO particularly was concerned that the old responsiveness rule allowed a bidder to decide after opening whether to make its bid acceptable by obtaining a proper guarantee.[15] The GAO has since carved out a number of exceptions to this "all or nothing" rule.[16] As a general rule today, however, if an offeror fails to submit an enforceable bid guarantee that complies with the terms of the solicitation, the contracting officer must reject the bid as nonresponsive.[17]

Review of Bid Guarantees

For military construction contracts, the Defense Federal Acquisition Regulation Supplement (DFARS) limits bid guarantees to surety bonds, United States bonds, Treasury notes, or other public debt obligations of the United States.[18] In most cases, offerors will submit either a corporate surety or individual surety bond as a bid guarantee.[19] The contracting officer may not look beyond the

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[7] 69 F. 819 (8th Cir. 1895).

[8] *Id.* at 820.

[9] *Id.* at 823. The bidder found that it could not "make hay" on the contract and refused to perform. The government recovered $3,572.28 in an action against the bidder and its sureties in district court. The court of appeals, however, set aside this judgment for reasons unrelated to the bond requirement.

[10] *See, e.g.*, 7 Comp. Gen. 568 (1928).

[11] 14 Comp. Gen. 559 (1935); 14 Comp. Gen. 305 (1934).

[12] 37 Comp. Gen. 293 (1957); 31 Comp. Gen. 20 (1951); Armed Serv. Procurement Reg. 2-404 (1947).

[13] *See* FAR 14.304.

[14] 38 Comp. Gen. 532 (1959).

[15] *Id.* at 536. The GAO also opined that this practice caused undue delay and resulted in inconsistent treatment of bidders. Determining why the bidder failed to provide a bond would take time, and contracting officers might treat bidders inconsistently because one contracting officer might waive the requirement on one set of facts, but another contracting officer might rule differently. The Army also argued that the old rule promoted irresponsible bidding. For example, a bidder might be unable to obtain bonding until its surety was satisfied that the low bid was in line with the other experienced contractors' bids. Under this scheme, a bidder could wait for the bid results and then secure bonding. It also could decide that an award was not in its interests and claim that it was unable to secure bonding, at which time the contracting officer would have to reject the bid.

[16] FAR 28.101-4 (b), (c). The exceptions are: 1) if the contracting officer will not award a negotiated contract without discussion, the offeror may, during discussions, correct a defective bond; 2) the government receives only one offer; 3) the bid guarantee is less than required but equal to or greater than the difference between the offer and the next higher acceptable offer; 4) the bid guarantee is less than the amount required for a maximum quantity offered but is sufficient for a quantity for which the offeror is eligible for award; 5) the guarantee is late but waivable under late bid rules; 6) the guarantee is inadequate as a result of a correctable mistake in bid, and the offeror increases the guarantee to the proper level after bid correction; 7) the contracting officer receives a telegraphic offer modification without corresponding modification of the bid guarantee, if the modification refers to the previous offer and the offeror corrects any deficiency in the bid guarantee; 8) an offeror submits an otherwise acceptable bid bond with a signed offer, but the offeror or principal did not sign the bond; 9) an otherwise acceptable bond is undated or erroneously dated; and 10) the bond does not list the United States as obligee, but identifies the offeror, solicitation number, and the name and location of the project. *Id.*

[17] FAR 28.101-4 (a), (b); Professional Restoration Services, Inc., Comp. Gen. Dec. B-232424 (9 Jan. 1989), 89-1 CPD ¶ 13.

[18] DFARS 228.101-1(b), 252.228-7007; see 31 C.F.R. part 225 for regulations governing the use of United States bonds, notes, and other debt obligations of the United States.

[19] In this case, a surety bond is a written instrument executed by a principal (bidder) and a second party (surety) to assure that the principal will fulfill its obligation to a third party (government). If the principal defaults, the surety is liable to the extent provided in the bond. The principal is also liable to both the government and the surety. A surety may be either a corporation or an individual. FAR 28.001.

four corners of these bonds to determine if they are legally sufficient.[20] Initially, this article will describe the two surety bond types and address common problem areas encountered during bond reviews. The remainder of this section will highlight factors that affect the validity of the bond.

Corporate Sureties

An offeror most likely will submit a Standard Form 24 (SF 24) for its bid guarantee.[21] With corporate sureties, contracting officers must verify that the surety appears in Department of Treasury Circular 570 (TC 570).[22] If TC 570 does not list the surety, the bond is insufficient, and the government must reject the bid as nonresponsive.[23] The Department of the Treasury, however, publishes this circular only once a year in July, and it may add or delete sureties between publications. To determine whether a surety not listed in the July edition is actually unacceptable or not, or to find out whether the Department of the Treasury has removed a listed surety from TC 570 after the July publication, contracting officers must consult either the Federal Register or the Commerce Clearing House, *Government Contracts Reporter*, Volume 2, for interim changes. Additionally, the Surety Bond Branch at the Department of the Treasury will provide assistance if needed.[24] If the surety is acceptable, the contracting officer also must check TC 570 or its interim changes to ascertain whether the surety is licensed in the state where it provided the bond.[25] Additionally, the contracting officer should ensure that the penal sum of the bond does not exceed the surety's underwriting limit listed in TC 570.[26]

Corporate sureties must include a power of attorney with the bid bond.[27] The power of attorney is prima facie evidence that the surety's representative (attorney-in-fact) is authorized to commit the surety to the bond.[28] If the attorney-in-fact's authorization to sign for the surety is unclear, the bond is unenforceable and the government must reject the bid as nonresponsive.[29] The contracting officer should review the power of attorney and ensure that it names the same attorney-in-fact who signed the bond. Likewise, the corporate seal stamped on the bond should be the seal of the corporation that issued the power of attorney. No doubt should exist concerning which surety the attorney-in-fact intended to bind.[30] Finally, the contracting officer must be mindful that after bid opening, he or she may not consider evidence other than the bond and the power of attorney to verify the authority of the attorney-in-fact. In addition, the contracting officer may not consult a surety to clarify whether a surety named on the bond or one named in the power of attorney intended to bind itself, when the surety's intent is unclear from the face of the bond and power of attorney.[31]

Individual Sureties

In lieu of a corporate surety, a contractor may use an individual surety to support its bond.[32] Unlike corporate sureties, which may limit their liability under a bond,

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[20] G & C Enterprises, Comp. Gen. Dec. B-233537 (15 Feb. 1989), 89-1 CPD ¶ 163.

[21] General Serv. Admin., Standard Form 24, Bid Bond (rev. Jan. 1990) [hereinafter SF 24].

[22] FAR 28.202 (a)(1); Dep't of Treasury, Circular 570, Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and Acceptable Reinsuring Companies, 1990 Rev. (July 1, 1990) [hereinafter TC 570].

[23] Alpha Sigma Inv. Corp., Comp. Gen. Dec. B-194629.2 (17 May 1979), 79-1 CPD ¶ 360; *see* Ron Grove's Heating, Air Conditioning, and Piping, Inc., Comp. Gen. Dec. B-198687 (23 May 1980), 80-1 CPD ¶ 360 (that TC 570 lists subsidiary corporation does not make parent corporation acceptable); *see also* 31 U.S.C. §§ 9304, 9305 (1982).

[24] The Surety Bond Branch phone number is (202) 287-3921. *See* TC 570, 1990 Rev., eff. July 1, 1990.

[25] *See* 31 U.S.C. § 9306 (1983); 31 C.F.R. § 223.5(b); TC 570, note (c). The surety need not be licensed where the contractor resides or where the construction will take place.

[26] FAR 28.202(a)(2); *see infra* note 74.

[27] G & C Enterprises, Inc., Comp. Gen. Dec. B-233537 (15 Feb. 1989), 89-1 CPD ¶ 163.

[28] All Star Maintenance, Inc., Comp. Gen. Dec. B-234820 (24 Mar. 1989), 89-1 CPD ¶ 305. Any person not a member of the bidding entity (e.g., not a partner or corporate officer) who signs a bond for the *principal* should also include a power of attorney. *See* SF 24, instruction 2. However, the fact that the authority of one signing for the principal is not clear, will not be a fatal defect if an offer signed by the principal accompanies the bond. *See* FAR 28.101-4(c)(7).

[29] *See, e.g.*, G & C Enterprises, Inc., Comp. Gen. Dec. B-233537 (15 Feb. 1989), 89-1 CPD ¶ 163.

[30] *Id.* at 3. Note, however, that a bond is not defective because it lacks a corporate seal. Siska Constr. Co., Comp. Gen. Dec. B-218428 (11 June 1985), 85-1 CPD ¶ 669.

[31] All Star Maintenance, Inc., Comp. Gen. Dec. B-234820 (24 Mar. 1989), 89-1 CPD ¶ 305.

[32] FAR 28.203(a); Promet Marine Servs. Corp., Comp. Gen. Dec. B-234117 (21 Feb. 1989), 89-1 CPD ¶ 181; *see* 31 U.S.C. § 9304(b) (1982) (official may not require that offeror give bond through a guaranty corporation). Prior to 26 February 1990, the FAR required that bidders obtain at least two individual sureties for their bonds. Quality Trust Constr. Co., Comp. Gen. Dec. B-235491 (22 May 1989), 89-1 CPD ¶ 489. Now the FAR requires only one surety, but its assets must equal or exceed the penal sum of the bond. FAR 28.203(b).

each individual surety is liable for the entire penal sum.[33] The Federal Acquisition Regulation (FAR) provisions governing individual sureties have recently undergone significant change.[34] This article will highlight pertinent changes as they relate to the general discussion that follows.

If a bidder opts to use individual sureties, and the bid bond is valid on its face, the contracting officer must next determine whether the surety is acceptable and whether the surety's assets are sufficient to support the bond.[35] With regard to the general acceptability of an individual surety, the FAR now provides that the contracting officer *may* exclude those who lack integrity or those whom, for some reason, the government has excluded from participating in federal contracting.[36] For example, an individual may not be acceptable if he or she has defaulted on previous bond obligations, has failed to disclose all outstanding bond obligations, or has misrepresented the value of assets and liabilities. Additionally, the contracting officer *shall* reject proposed sureties that the government has suspended, debarred, or proposed for these actions.[37]

If an individual passes muster as a surety, the next step is a review of Standard Form 28 (SF 28), Affidavit of Individual Surety, which should accompany the bid bond.[38] On the SF 28, a surety lists its current assets and encumbrances. If an offeror uses only one surety, the net worth of the surety, reduced by all other outstanding bond obligations, must equal or exceed the penal amount of the bond. If an offeror submits more than one surety, the combined assets of the sureties must meet the penal sum.[39] In the past, contracting officers could limit their investigations to the four corners of the affidavit, unless the affidavit was facially inconsistent or the asset valuation was questionable. Conversely, if a contracting officer perceived that a surety had submitted "junk bonds," he or she could conduct an in-depth investigation or could require certified audits, real estate appraisals, and evidence of property ownership. Because the validity of the information on the SF 28 is a matter of responsibility, the GAO would defer to the contracting officer's judgment as long as the contracting officer acted reasonably and in good faith.[40]

Recent changes to part 28 of the FAR, however, now require sureties to do more than merely submit an affidavit of individual surety. For example, a surety now must provide evidence of title, evidence of encumbrances, and a current tax assessment or certified appraisal for real property assets.[41] Aggressive contracting officers have imposed similar requirements in the past if they deemed them as necessary, and the GAO generally approved these practices in opinions rendered before the FAR changes.[42]

The recent changes to the FAR apparently are the result of increasing deliberate abuse or ignorance of the affidavit requirement on the part of individual sureties or

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[33] FAR 28.001; FAR 28.203(b); Ware Window Co., Comp. Gen. Dec. B-233367 (6 Feb. 1989), 89-1 CPD ¶ 122. Note that a bond principal (offeror) cannot also act as surety because that would defeat the purpose of having a third party liable in the event the offeror defaults. *See* Appropriate Technology, Ltd., Comp. Gen. Dec. B-233480 (23 Jan. 1989), 89-1 CPD ¶ 60; F & F Pizano, Request for Reconsideration, Comp. Gen. Dec. B-219591.2, B-219594.2 (27 Aug. 1985), 85-2 CPD ¶ 234.

[34] *See* FAR 28.203-2 to 28.203-7; Fed. Acquisition Cir. 84-53 (28 Dec. 1989) [hereinafter FAC].

[35] FAR 28.203(a). The acceptability of a surety and its assets is a question of responsibility. Some practitioners, however, confuse surety acceptability with the threshold question of bond enforceability, which is a responsiveness issue. *See* Labco Constr., Comp. Gen. Dec. B-232986 (9 Feb. 1989), 89-1 CPD ¶ 135; Jerry Eaton, Inc., Comp. Gen. Dec. B-233458 (24 Jan. 1989), 89-1 CPD ¶ 71; Asceves Constr. and Maint., Comp. Gen. Dec. B-233027 (4 Jan. 1989), 89-1 CPD ¶ 7.

[36] FAR 28.203-7; FAC 84-53 (28 Dec. 1989). The contracting officer also may exclude a surety who has made false or misleading entries on bonds or affidavits, or for any responsibility-related reason of a "serious and compelling nature." Before the FAR change, the GAO approved the exclusion of sureties that failed to list all outstanding bond obligations or that were involved in other actual or apparent integrity breaches. *See, e.g.*, Jerry Eaton, Inc., Comp. Gen. Dec. B-233458 (24 Jan. 1989), 89-1 CPD ¶ 71; Electrical Generation Technology, Inc., Comp. Gen. Dec. B-235809 (31 Aug. 1989), 89-2 CPD ¶ 204 (bond brokerage firm under investigation).

[37] FAR 28.203-7(d); FAR 9.405(c). Just as one must check TC 570 for corporate sureties, one should also consult the "List of Parties Excluded from Federal Procurement or Nonprocurement Programs" when reviewing individual surety bonds. Recent updates are available by phone or by computer from the GSA bulletin board service. Call (202) 523-4873 for assistance.

[38] General Serv. Admin., Standard Form 28, Affidavit of Individual Surety (rev. Jan. 1990) [hereinafter SF 28]. Failure to provide an SF 28 with the bond or failure to list all assets and liabilities does not require rejection of the bid as nonresponsive as long as the SF 24, Bid Bond, is enforceable and meets the terms of the solicitation. *See* Noslot Pest Control, Inc., Comp. Gen. Dec. B-234290 (20 Apr. 1989), 89-1 CPD ¶ 396.

[39] FAR 28.203(b). An offeror may submit up to three sureties. *Id.*

[40] *Compare* Northwest Piping, Inc., Comp. Gen. Dec. B-233796 (30 Mar. 1989), 89-1 CPD ¶ 333 (protestor unsuccessfully claimed contracting officer failed to look far enough) *with* Asceves Constr. and Maint., Inc., Comp. Gen. Dec. B-233027 (4 Jan. 1989), 89 1 CPD ¶ 97 (protestor unsuccessfully complained that contracting officer went too far).

[41] FAR 28.203-3(a).

[42] *See* cases cited *supra* note 40; *see also* C. E. Wylie Constr. Co., Comp. Gen. Dec. B-234123 (25 Apr. 1989), 89-1 CPD ¶ 406 (protestor alleged contracting officer did not thoroughly investigate surety); S & A Constr. Co., Comp. Gen. Dec. B-235490.2 (9 Aug. 1989), 89-2 CPD ¶ 119 (contracting officer contacted appraiser to confirm value of real property, called bank officer who signed asset verification on SF 28, and had OSI investigate sureties).

surety brokers. For example, in one case a surety listed real property and stock holdings on the SF 28. When the contracting officer attempted to confirm that surety's net worth, he discovered that the real property appraiser merely made a rough estimate of value, only looked at some of the land, and did not even verify the ownership of the property. Additionally, the bank officer who signed the certificate of sufficiency on the back of the SF 28 did not determine independently the value of the surety's assets, but instead merely took the surety's word.[43] The contracting officer disapproved the surety and rejected the bid.[44] Protests in this area have increased dramatically and usually originate from low bidders whose sureties the contracting officer rejects.[45] Additionally, authorities have been investigating sureties and surety brokers in unprecedented numbers.[46]

In several respects, the FAR has gone beyond the usual practices of the past.[47] In addition to the requirement to provide evidence of assets and their value, real property and personalty will not be acceptable unless a surety grants the government a security interest in them.[48] Acceptable personal property is limited to cash, readily marketable assets, and irrevocable letters of credit from federally-insured financial institutions; moreover, a surety must now deposit these assets in an escrow account in the name of the contracting agency.[49] For real property, a surety must record a lien in favor of the government.[50]

In some past cases, the GAO has opined that requiring sureties to provide security interests unduly restricted competition.[51] The FAR change legitimizes this requirement, however, and the GAO will likely defer to the implicit determination of the FAR drafters that security interests are essential to protect the government from fraudulent practices. Indeed, the GAO has found this practice unobjectionable when mandated by one agency's FAR supplement.[52] It seems odd, though, that the imprimatur of an agency regulation can transform this practice into an *acceptable* restriction on competition, regardless of the ultimate net effect on contractors. Consider the following cases.

In *Altex Enterprises*[53] the GAO sustained a protest to a *local* practice that required bidders to furnish security interests. The GAO found that the requirement came "close to being a prohibition against the use of individual sureties," which would conflict with the FAR provision permitting their use.[54] The GAO further opined that the contracting officer failed to "demonstrate *prima facie* support" for the requirement because he had not attempted to verify the sureties' net worth and had no reason to question the property titles or appraisals.[55] The GAO concluded that the contracting officer's requirement unduly restricted competition.[56]

One month later, the GAO *upheld* a similar requirement. In *Coliseum Construction, Inc.*[57] a Navy facilities engineering command issued a solicitation that required individual sureties to *deposit* cash, bonds, or notes of the United States as bond security. The solicitation also provided that the offeror could not base the acceptability of sureties on the SF 28 alone.[58] The Navy imposed this requirement under an approved pilot program to streamline the contracting process. The Navy justified the requirement by asserting that contracting officers were unable to verify properly: 1) net worth; 2) the number and existence of other bonds underwritten by the same

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[43] S & A Constr. Co., Comp. Gen. Dec. B-235490.2 (9 Aug. 1989), 89-2 CPD ¶ 119. GAO has deleted the certificate of sufficiency from the SF 28 as revised. As illustrated in the case cited, it was not always effective. Additionally, the new security interest requirement diminishes its importance.

[44] *Id.*

[45] Between 1985 and 1987, only six protests occurred per year. In 1988, 21 protests occurred, and in the first half of 1989, 23 occurred. Of these 62 decisions, 49 involved low bidders who protested the rejection of their individual sureties. *See* GAO Fact Sheet for Congressional Requester, Individual Sureties Used for Support of Federal Construction Contract Bonds (GAO/RCED-90-28FS), Oct. 1989, at 23-25 [hereinafter GAO Fact Sheet].

[46] In July 1989, over 100 open investigations of individual sureties existed. The Army Criminal Investigation Command (CID) was conducting 50 of them. *See* GAO Fact Sheet, *supra* note 45, at 14-16.

[47] Only the General Services Administration (GSA) had formalized the requirement to provide a security interest in pledged assets before the FAR change. *See* General Servs. Admin. Acquisition Reg. (GSAAR) 552.228-74; *see also* Noslot Pest Control, Inc., Comp. Gen. Dec. B-234290, (20 Apr. 1989), 89-1 CPD ¶ 396.

[48] A security interest is a "form of interest in property which provides that the property may be sold on default in order to satisfy the obligation for which the security interest is given." Black's Law Dictionary 1217, (5th ed. 1979).

[49] FAR 28.203-1(b)(1); 28.203-2(b).

[50] FAR 28.203-3(d); *see* FAR 52.228-11.

[51] Consolidated Indus. Skills Corp., 69 Comp. Gen. 10 (1989); Asceves Constr. and Maint., Inc., Comp. Gen. Dec. B-233027 (4 Jan. 1989), 89-1 CPD ¶ 7 (issue not case dispositive but noted by GAO as unduly restrictive); Altex Enter., 67 Comp. Gen. 184 (1988).

[52] *See* Pete Vicari Gen. Contr., Inc., Comp. Gen. Dec. B-236927 (23 Jan. 1990), 90-1 CPD ¶ 92. In a March 1989 letter to the FAR Secretariat, the GAO opined that a FAR change of this nature would provide the authority that the Comptroller General found lacking in *Altex*. Comp. Gen. Dec. B-230529.4, B-233708 (20 Mar. 1989).

[53] 67 Comp. Gen. 184 (1988).

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] 67 Comp. Gen. 234 (1988).

[58] *Id.*

individual sureties; 3) the status of other contracts bonded by the sureties; and 4) the continued acceptability of the sureties and the value and availability of their assets.[59] Crucial to the GAO's decision was the fact that the Navy's requirement stemmed from a properly obtained FAR deviation, whereas the GAO did not authorize the *Altex* contracting officer's deviation in a similar manner.[60] The GAO actually suggested that the Navy propose a FAR revision if it desired to continue the practice beyond its one-year test period.[61]

Interestingly, the contracting officer in *Altex* shared the same concerns that justified the Navy's deviation.[62] He felt his requirement was necessary to ensure that a surety's net worth would remain adequate during contract performance. As noted, the GAO in *Altex* also found the contracting officer's actions arbitrary because he had no basis for questioning the soundness of the sureties' assets. Indeed, the FAR now imposes a security interest requirement on *any* surety, regardless of the apparent status of its assets.

Regardless of the impact of this new rule, if an offeror's sureties cannot meet this requirement and if the offeror fails to posit acceptable assets within a reasonable time, the contracting officer generally may not permit the offeror to substitute a new surety.[63] This prohibition against substituting sureties obtains because, when an offeror initially identifies an acceptable surety on an SF 24, the bond is enforceable; and, as mentioned previously, enforceability relates to the threshold question of responsiveness. If the surety, however, becomes unacceptable because its assets are insufficient or it cannot provide a security interest in them, the substitution of a new surety would be tantamount to impermissibly curing a responsiveness defect after bid opening.[64]

The impact of the FAR changes may be uncertain for now. Nevertheless, despite the added protection and efficiency that GAO intended to promote by adding these requirements, contracting officers still may have to look beyond the legal instruments that offerors submit to verify that their bonds are valid and enforceable. Because contracting officers normally should afford a bidder an opportunity to explain or cure defective affidavits and security interests, delays occasioned by a need to clarify misunderstood requirements or explain questionable documents will continue to occur.[65] Likewise, the changes will not necessarily preclude dishonest sureties or brokers from continuing past fraudulent practices; rather, they will only make these practices more difficult to commit. Finally, if legal advisors must review these instruments, guidance concerning the nature and extent of the required review is necessary.[66]

Form of the Bond

A contractor does not have to use an SF 24 as its bid bond. Any bond that does not deviate substantially from the terms of an SF 24 is acceptable.[67] In *Kiewit Western Co.*[68] the GAO found a commercial bond form to be defective. The language on the form limited the surety's liability to either the penal sum or the difference in price between the contractor's bid and the price at which the government could award a contract within a reasonable time.[69] The GAO noted, however, that an SF 24 binds a surety to pay "any cost" of awarding a contract to another contractor, which includes the difference between the two bids *and* the administrative costs of resoliciting.[70] The GAO opined that although award to Kiewit Western would have saved the government $16,000, protecting the integrity of the bidding system required the government to reject the bid as nonresponsive.[71] The GAO has reached the same conclusion in other similar cases.[72]

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[59] *Id.*

[60] *Id.*

[61] *Id.* at 236.

[62] *Altex*, 67 Comp. Gen. at 186-87.

[63] The contracting officer may permit substitution if he or she receives only one bid, or if he finds all other bidders ineligible for award. In a commercial activity (A-76) competition, the government considers its estimate a bid. *See* Management Servs. Group, Comp. Gen. Dec. B-234412 (24 May 1989), 89-1 CPD ¶ 499.

[64] *See* Southern Cal. Eng'g Co., Comp. Gen. Dec. B-234515.2 (21 Aug. 1989), 89-2 CPD ¶ 156; Management Serv. Group, Comp. Gen. Dec. B-234412 (24 May 1989), 89-1 CPD ¶ 499.

[65] *See* Noslot Pest Control, Inc., Comp. Gen. Dec. B-234290 (20 Apr. 1989), 89-1 CPD ¶ 396; *cf.* Hughes & Hughes, Comp. Gen. Dec. B-235723 (6 Sept. 1989), 89-2 CPD ¶ 218; North Am. Constr. Corp., Comp. Gen. Dec. B-235170 (20 July 1989), 89-2 CPD ¶ 69.

[66] FAR 28.203(f).

[67] Allgood Elec. Co., Comp. Gen. Dec. B-230566 (8 June 1989), 89-2 CPD ¶ 58; Kiewit Western Co., B-220084 (31 Oct. 1985), 65 Comp. Gen. 54, 85-2 CPD ¶ 497.

[68] 65 Comp. Gen. 54.

[69] *Id.* at 56.

[70] *Id.*

[71] *Kiewit*, 65 Comp. Gen. at 58.

[72] *See, e.g.*, Johnson Controls, Inc., Comp. Gen. Dec. B-235517 (25 Aug. 1989), 89-2 CPD ¶ 177; Allgood Electric Co., Comp. Gen. Dec. B-230566 (8 June 1989), 89-2 CPD ¶ 58.; Perkin-Elmer, B-214040 (8 Aug. 1984), 63 Comp. Gen. 529, 84-2 CPD ¶ 158 (form limited the period within which government had right to recover to 90 days).

The FAR should allow contracting officers to treat a *Kiewit*-type defect as a waivable minor irregularity.[73] The contracting officer will know whether the administrative reprocurement costs will be significant, and should be free to balance these costs with any savings that will accrue from award to an otherwise acceptable low bidder.

In addition, the integrity of the bidding process would not suffer if the FAR allowed waiver in *Kiewit*-type cases. A bid bond that limits the liability of a surety, in a way that the *Kiewit* bond did, will not necessarily be less expensive than one issued on an SF 24. A bidder who uses an SF 24 cannot then complain that its bid would have been lower if it had used a "nonconforming" commercial instrument. Moreover, in cases in which the difference between the two bids exceeds the penal sum of the rejected bidder's bond, the surety will not be liable for administrative costs of reprocuring in any event. A surety is never liable for an amount greater than the penal sum of the bond.[74] Until the GAO holds otherwise, however, the contracting officer must ensure that the terms set forth on any commercial form substantially comply in all respects with the language of the SF 24. If the form limits the surety's liability in a manner inconsistent with the SF 24, the bond is defective, and the contracting officer must reject the bid as nonresponsive.

Penal Sum of the Bond

As a general rule, the bid bond must include the proper penal sum expressed either as a specific dollar amount or as a percentage of the bid price.[75] As a matter of law, a surety is liable only to the extent that it expressly agrees to bind itself.[76] Thus, a bond that lacks a penal sum would be unenforceable against the surety if the principal defaulted.[77] Likewise, a bond that includes an insufficient penal amount also will be generally defective, and the government cannot increase the penal sum after award.[78]

The GAO, however, recently forged a new exception to this general rule. In *Professional Restoration Services, Inc.* the contracting officer rejected the protestor's bid because the surety failed to include a penal sum on the SF 24.[79] The surety instead had inserted near its signature block a liability limit closely approximating the required penal amount. The GAO found the bond enforceable because, by its terms, the bond committed the surety "for payment of the sum shown opposite [its name]."[80] It concluded, however, that if the offeror uses multiple corporate sureties, a single surety's liability limit probably would not approximate the penal sum because each surety would be liable only for a portion of that amount.[81]

Alterations

The contracting officer also must scrutinize the bond and power of attorney, if applicable, to determine whether anyone has altered these documents or any entry on these documents. If someone has modified a material provision, the bond is unenforceable unless evidence provided with the bond establishes that the surety consented to the change. Absent evidence of consent, the contracting officer must reject the bid as nonresponsive.[82] Examples of material alterations include whiting-out and typing over the penal amount, or changing the solicitation number and project title.[83] A bond that contains an altered execution date, however, is not necessarily unenforceable; therefore the contracting officer would not have to reject the bid.[84]

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[73] *See* FAR 28.101-4. The contracting officer should allow the waiver only if a deviation relates to the administrative costs of reprocurement. The contracting officer should not permit a limitation on the government's right to sue on the bond. *Id.*

[74] The penal sum is the amount specified in the bond as the maximum payment for which the surety is obligated. FAR 28.0001.

[75] Kennedy Elec. Co., Comp. Gen. Dec. B-239687 (24 May 1990), 90-1 CPD ¶ 499; Allen County Builders Supply, 64 Comp. Gen. 505 (1985).

[76] Allen County Builders Supply, 64 Comp. Gen. at 506.

[77] *Id.*

[78] HTP Enter., Comp. Gen. Dec. B-235200 (27 April 1989), 89-1 CPD ¶ 418 (surety inserted insufficient sum intended for another bid). *But see* FAR 28.101-4(c)(2) for an exception to this rule.

[79] Comp. Gen. Dec. B-232424 (9 Jan. 1989), 89-1 CPD ¶ 13.

[80] *Id.*

[81] 89-1 CPD ¶ 13 at 2. The GAO also found that although the stated limit of liability was less than the required penal sum, it was greater than the difference between the two low bids, and was therefore acceptable. *See* FAR 28.101-4(c)(2).

[82] *See* Giles Management Constructors, Comp. Gen. Dec. B-227982 (14 Sep. 1987), 87-2 CPD ¶ 248. Note that a *bidder's* initials are not evidence that the surety consented to the change, and that an individual surety supporting the bond is closely related to the principal that made the initialed changes will make no difference. *See* Structural Finishing, Inc., Comp. Gen. Dec. B-201614 (21 Apr. 1981), 81-1 CPD ¶ 303; Southland Constr. Co., Comp. Gen. Dec. B-196297 (14 Mar. 1980), 80-1 CPD ¶ 199.

[83] *See, e.g.*, J.P. Sulzbach, Inc., Comp. Gen. Dec. B-234004 (14 Mar. 1989), 89-1 CPD ¶ 271; Giles Management Constructors, Comp. Gen. Dec. B-227982 (14 Sept. 1987), 87-2 CPD ¶ 248.

[84] *See* G&P Parlamas, Inc., Comp. Gen. Dec. B-226335 (27 Apr. 1987), 87-1 CPD ¶ 593.

Letters of Credit

Under the DFARS, letters of credit furnished by the *offeror* in lieu of a bond are not acceptable bid guarantees,[85] but apparently nothing prohibits an individual surety from submitting such a security. A federally-insured financial institution, however, must issue a letter, and it must be irrevocable for the entire bid acceptance period.[86] Letters that are not firm commitments, or that place conditions on the government's right to enforce them, are unacceptable. A letter of credit should include the solicitation number or otherwise unambiguously identify the project for which the institution issued it.[87] As with bid bonds, enforceability of letters of credit is of paramount importance. The contracting officer should, however, allow an individual surety a reasonable time to cure a defective letter because, as mentioned, the sufficiency of a surety's assets is a question of responsibility, not responsiveness.[88]

Photocopied Bonds

If an offeror submits photocopied bonds without original surety signatures, or if the bond is an original but the signatures are electrostatic copies, the bond is fatally defective. Such a bond likely will be unenforceable because the face of the bond does not indicate that the surety agreed to bind itself.[89] Contracting officers should warn offerors of this potential problem, especially when the particular situation authorizes offerors to submit facsimile bids.[90]

Performance and Payment Bonds

The government has "long been in the habit of exacting [performance] bonds from those with whom contracts were made for the doing of public work."[91] The government intended these bonds to ensure that the contractor met all contractual requirements, but the government did not intend the bonds to benefit the parties who provided material or labor for the prime contractor.[92] In addition, materialmen and laborers could not perfect liens against federal government property to secure payments due on particular projects.[93] Indeed, the sole protection afforded these subcontractors might arise from contractual provisions under which the contracting officer could withhold final payment on the contract until the contractor paid its debts.[94] Despite this remedy, contractors continued to victimize workers.[95]

In 1894, Congress passed the Heard Act.[96] This new law required contractors to execute a bond that would assure both performance of the contract and payment of parties who supplied material or labor on federal projects.[97] The bond, in part, was a substitute for state law lien rights that a subcontractor would have in private sector projects.[98] A party who furnished labor or material could now sue on the bond in the name of the United States if the contractor did not pay "promptly."[99] As amended in 1905, however,[100] the Heard Act clearly provided that the government's right to sue on the bond was superior to the rights of materialmen and laborers. If the government decided to sue, unpaid suppliers could

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[85] *See* DFARS 228.101-1(b); 252.228-7007.

[86] FAR 28.203-2(a); *see* Kentucky Bridge and Dam, Inc., Comp. Gen. Dec. B-235806 (17 Jul. 1989), 89-2 CPD ¶ 56 (letter that, by its terms, expired within 83 days was unacceptable when the bid acceptance period was 90 days).

[87] *See* Urban Servs. Sys. Corp., Comp. Gen. Dec. B-235124 (25 Jul. 1989), 89-2 CPD ¶ 78; Meridian Constr. Co., Comp. Gen. Dec. B-230566 (8 Jun. 88), 88-1 CPD ¶ 544.

[88] *Cf.* Hughes & Hughes, Comp. Gen. Dec. B-235723 (6 Sept. 1989), 89-2 CPD ¶ 218. The adequacy of an individual surety's *letter of credit* raises *responsibility* issues because the letter is not the bond but merely "backs" the bond. An otherwise valid *bond* is enforceable against the surety regardless of the status of the assets that support it. Therefore, responsiveness—that is, whether the offeror has submitted an enforceable bond that meets the terms of the solicitation—is not in question.

[89] *See* Darla Envtl., Inc., Comp. Gen. Dec. B-234560 (12 May 1989), 89-1 CPD ¶ 454; The King Co., Comp. Gen. Dec. B-228489 (30 Oct. 1987), 87-2 CPD ¶ 423 (photocopying raises concerns that someone may have altered document without consent of the surety).

[90] FAR 14.202-7 and 52.214-31 prescribe the use of facsimile bids.

[91] United States *ex rel.* Anniston Pipe & Foundry Co. v. National Sur. Co., 92 F. 549, 551 (8th Cir. 1899).

[92] Sears v. Mahoney, 66 F. 860, 862 (E.D. La. 1895) (performance bonds were only to prevent "annoyance to the government agents, and, possibly litigation against the government").

[93] United States *ex rel.* Hill v. American Sur. Co. of N.Y., 200 U.S. 197, 203 (1906).

[94] Greenville Sav. Bank v. Lawrence, 76 F. 545 (4th Cir. 1896).

[95] During this period, "in many cases person or persons entering into contracts with the United States for the building of public buildings are wholly insolvent at the time or at the completion of such work, and thereby persons furnishing material or labor are without remedy." H.R. Rep. No. 97, 53d Cong., 1st Sess. 1 (1893).

[96] 28 Stat. 278, ch. 280 (1894) (amended 1905).

[97] *Id.* at 278.

[98] *Hill*, 200 U.S. at 203.

[99] Heard Act, 28 Stat. at 278.

[100] 33 Stat. 811, ch. 778 (1905) (repealed 1935).

intervene and obtain a share of any bond proceeds remaining after satisfaction of government claims. If the government did not sue, the Heard Act required workers to wait six months after final contract settlement to file actions.[101]

In 1935, the Miller Act repealed the Heard Act.[102] The new law was a response to subcontractor complaints that the Heard Act was cumbersome and that it unduly delayed the collection of money by requiring suppliers to stay actions.[103] In pertinent part, the Miller Act today requires prime contractors on public works projects exceeding $25,000 to submit performance and payment bonds before award of the contract.[104] A performance bond is for the protection of the government and must be in an amount satisfactory to the contracting officer.[105] The payment bond "assures payments as required by law to all persons supplying labor or material in the prosecution of the work provided for in the contract."[106] The amount of the payment bond will vary depending on the price of the awarded contract.[107] In practice, the contracting officer actually issues the formal notice of award before the contractor furnishes the bonds. The contractor may not, however, commence performance before furnishing all bonds and receiving a notice to proceed.[108]

The use of separate bonds prevents the subordination of subcontractors' claims to government claims when a contractor fails to fully perform. Additionally, under the Miller Act, unpaid subcontractors (and those in privity with subcontractors) may file suit ninety days after providing the final labor or material on the project, instead of waiting until the contractor has completed the project.[109]

The Miller Act legislation stems from the depression era—a time when construction workers normally found jobs only on public works. Congress intended the Miller Act, in part, to prevent workers from being "defrauded and cheated of their wages."[110] Today, after fifty-five years, the Miller Act remains an essential remedy for materialmen and laborers unable to secure just payment for supplies and services. For this reason, a contractor serves the interests of the Miller Act only when the contractor furnishes the government with legally sufficient and enforceable bonds.

Contract Administration Related to Miller Act Bonds

If the contracting officer finds that the offeror's bid bond complies with the terms of the solicitation, that it is enforceable, and that the sureties are acceptable, he or she should issue a notice of award.[111] As indicated previously, performance and payment bonds are not a condition precedent to award of a contract.[112] Upon receipt of the award document, the contractor will then have a specified period (usually ten days) within which to furnish Miller Act bonds and execute the contract.

The contracting officer reviews these bonds in the same way he or she reviews bid bonds. The offeror may have tendered corporate or individual surety bonds, or other security[113] in lieu of sureties. The principles discussed above concerning the legal sufficiency and enforceability of bid bonds apply to performance and payment bonds as well. The contracting officer must also ensure that sureties and assets submitted by individual sureties are acceptable. In Army practice, after a thorough review or investigation, the contracting officer forwards the

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[101] *Id.* at 812.

[102] 49 Stat. 793-94, ch. 642 (1935) (codified as amended at 40 U.S.C. §§ 270a-f (1982)).

[103] H.R. Rep. No. 1263, 74th Cong., 1st Sess., 1 (1935). A letter from the Treasury Department incorporated in this report indicated that in many instances several years elapsed after the completion of work before suppliers were able to file suit. *Id.* at 1-2.

[104] 40 U.S.C. § 270a(a) (1982).

[105] This bond assures "performance and fulfillment of the contractor's obligations under the contract." FAR 28.001(f). A performance bond generally will be 100% of the contract price unless the contracting officer determines a lesser amount will protect the interest of the government. FAR 28.102-2(a)(1).

[106] FAR 28.001(e). The Supreme Court has held that the Miller Act extends only to subcontractors and parties in privity of contract with a subcontractor, i.e., a sub-subcontractor. J. W. Bateson Co. v. United States *ex rel.* Board of Trustees of the Nat'l Automatic Sprinkler Indus. Pension Fund, 434 U.S. 586, 591 (1978). For the Miller Act to consider a party a "subcontractor," the party must have a contract with the prime contractor and must perform a specific portion of the labor or material requirement for the prime contractor. *See* Clifford F. MacEvoy v. United States *ex rel.* Calvin Tompkins Co., 332 U.S. 102, 109 (1944).

[107] For contracts $1 million or less, the bond must be 50% of the contract price. If the contract price is greater than $1 million but no more than $5 million, the law requires a bond for 40% of the contract price. For all contracts over $5 million, the offeror must furnish a $2.5 million bond. 40 U.S.C. § 270a(a)(2) (1982); *see also* FAR 28.102-2(b)(1).

[108] FAR 28.102-1(b). Although the Miller Act requires that offerors provide bonds before award, boards and courts interpret this language to mean that the contracting officer cannot issue a notice to proceed until the offerors furnish the required bonds. *See, e.g.*, R. T. Madden Co., ASBCA No. 22999, 81-2 BCA ¶ 15,312.

[109] 40 U.S.C. § 270b(a) (1982). Claimants must file suit in federal court in the district in which they performed the contract. A materialman or laborer must initiate an action within one year of its providing the last supply or service for the project. *See Id.* at § 270(b).

[110] 79 Cong. Rec. 13383 (1935).

[111] This assumes the offeror is otherwise eligible for award. In other words, at this point the contracting officer has determined that the offeror is responsible. *See* FAR 9.103.

[112] Alta Constr. Co., PSBCA No. 1463 (11 Dec. 1989); Hellenic Corp., ASBCA No. 29210, 86-2 BCA ¶ 18,974.

[113] *See generally* FAR 28.204.

original bonds and instruments with a copy of the contract to the Chief Trial Attorney of the Army. The Bonds Team, Contract Appeals Division, reviews the instruments and accompanying papers and either approves them or returns them for corrective action.[114] If the Bonds Team finds the performance and payment bonds to be legally sufficient, the contracting officer should return the contractor's bid bond.[115] At this point, the contracting officer may also instruct the contractor to commence performance.[116]

If the contractor fails to provide legally sufficient bonds or other acceptable security in the proper amount, the contracting officer may terminate the contract for default.[117] The government may recover against the contractor, the bid bond surety, or the security.[118] Virtually no defense to this type of termination exists because neither financial inability, nor the refusal of a surety to provide further bonding, will justify avoidance of this material contractual obligation.[119]

Bond-related issues also may arise after the contractor begins performance. For example, if a surety on a contractor's bond becomes unacceptable during contract performance, the contracting officer must require the contractor to obtain new bonds or provide security in lieu of bonds.[120] The contracting officer may terminate the contract for default if the contractor is unable to secure new bonding.[121]

In addition, contract modifications may prompt questions concerning the adequacy of performance and payment bonds. If the contract price increases and the penal sums of the current bonds do not provide adequate protection, the contracting officer should require the contractor to furnish more bonding.[122] Modifications also may trigger other important contract administration requirements. Under the construction changes clause, the contracting officer may order certain modifications "within the scope" of the original contract without notifying bond sureties.[123] If, however, the modification is for new work or the work is "in scope," but as a result of the change the contract price increases or decreases by more than twenty-five percent or $50,000, the contracting officer must obtain the consent of the surety.[124]

In recent years, another aspect of contract administration has generated increasing litigation by sureties.[125] The FAR prohibits the withholding of progress payments from the contractor when the contractor has not paid subcontractors or suppliers.[126] In essence, this provision precludes contracting officers from protecting the interests of a surety even if they know a contractor has failed to make payments for which a surety may later be liable.[127] Despite this FAR restriction, the courts and boards consistently hold that the government has a duty to exercise discretion and "consider the surety's interest in conjunction with other problems [of contract administration]."[128] In effect, the government becomes a

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[114] Army Fed. Acquisition Reg. Supp. 28.106-90(b) (1 Apr. 1988) [hereinafter AFARS].

[115] DFARS 252.228-7007(a).

[116] FAR 28.102-1(b). The AFARS does not require the contracting officer to withhold notices to proceed pending the Bonds Team's approval. If the project start date is not crucial, however, awaiting approval may be prudent to preclude administration problems should the Bonds Team disapprove the bond. Moreover, Army contracting officers should retain bid bonds until the Bonds Team approves the performance and payment bonds.

[117] DFARS 252.228-7007(b); *see* Ruffin's A-1 Contracting, Inc., ASBCA No. 38343, slip op. (15 Aug. 1990); Quick Deck, Inc., PSBCA No. 1451, 86-2 BCA ¶ 18,986; Hellenic Corp., ASBCA No. 29210, 86-2 BCA ¶ 18,974; Sherkade Constr. Corp., DOT CAB No. 1632, 86-2 BCA ¶ 18,858.

[118] *See* DFARS 252.228-7007(d).

[119] *See* cases cited *supra* note 117.

[120] *See* FAR 28.202(c), 28.203(d); *see also* FAR 52.228-2(b).

[121] *See* JaMar Constr. Co., ENG BCA No. 5251, 87-3 BCA ¶ 20,125.

[122] *See* FAR 28.102-2(a)(2), (b)(3); *see also* FAR 52.228-2(c).

[123] FAR 52.243-4(a). "Within the scope" means that the work as modified is essentially the same work for which the parties originally contracted. *See* Keco Indus., Inc. v. United States, 176 Ct. Cl. 983 (1966).

[124] FAR 28.106-5(a)(2).

[125] *See* Balboa Ins. Co. v. United States, 775 F.2d 1158 (Fed. Cir. 1985); Ransom v. United States, 17 Cl. Ct. 263 (1989); U.S. Fidelity & Guar. Co. v. United States, 16 Cl. Ct. 541 (1989); U.S. Fidelity & Guar. Co. v. United States, 676 F.2d 622 (Ct. Cl., 1982); Peerless Ins. Co., ASBCA No. 28887, 88-2 BCA ¶ 20,730; *cf.* Mountaineer Real Estate, Constr. and Cablevision, Inc., ASBCA No. 25196, 84-1 BCA ¶ 16,944.

[126] FAR 28.106-7(a). Compare this provision with the authority a contracting officer has to retain up to 10% of a scheduled progress payment if the contractor's performance is unsatisfactory. *See* FAR 32.103. Additionally, contracting officers may withhold progress payments if a contractor fails to comply with the labor standards prescribed by the Davis-Bacon Act, such as payment of proper wage rates. 40 U.S.C. § 276a; FAR 22.406-9.

[127] *See U.S. Fidelity & Guar.*, 676 F.2d at 633 (Nichols, J. concurring) (calling on court to either agree that contracting officer has no discretion under this provision or to establish a workable standard of care that it must afford to a surety).

[128] *Balboa Ins. Co.*, 775 F.2d at 1164 (quoting Argonaut Ins. Co. v. United States, 434 F.2d 1362, 1368 (Ct. Cl. 1970)); *see* Peerless Ins. Co., ASBCA No. 28887, 88-2 BCA ¶ 20,730.

"stakeholder" upon notice from the surety and must act responsibly with regard to remaining contract funds.[129] While the courts and boards afford great deference to contracting officers who issue partial payments to contractors after receiving complaints from a surety, one court has stated that a bald assertion that payment was reasonable is "nothing more than mere blustering."[130] Thus, while the FAR prohibition against withholding payments is clear, equally certain is that contracting officers will not be able to justify their actions solely on the basis of this regulatory proscription. Additionally, contracting officers should not rely on a contractor's certification[131] that the contractor has paid his subcontractors and suppliers if the surety has presented evidence to the contrary. To bolster their positions, contracting officers should consider, and should be prepared to articulate, the factors that support their decisions to continue payments.[132]

If a contracting officer intends to terminate a contract for default during performance, he or she must notify the surety.[133] After termination, the surety may complete the project if the contracting officer determines that the surety or its proposed contractor is capable of satisfactory performance.[134] The contracting officer will modify the contract to reflect this takeover agreement, and the surety then assumes all rights and obligations of the original contractor.[135]

Administration issues are also meaningful in light of recent decisions that reinforce the right of sureties to litigate claims before the boards of contract appeals.[136] A surety has standing if it has performed under a takeover agreement or if a prime contractor sponsored it. In this sense, sureties are analogous to subcontractors for purposes of standing.[137] In *Peerless Insurance Co.* the Armed Services Board of Contract Appeals (ASBCA) also held that if an agreement subrogates the surety to the rights of a contractor, the surety is in privity with the government and has standing to appeal, even if it has not executed a takeover agreement.[138] Standing in the latter situation, however, is limited to claims for contract funds retained by the government when the original contractor defaults or for progress payments that the government improperly disbursed. The ASBCA's affording a surety standing to pursue *substantive* contract claims (e.g., challenge to a termination for default) under the principles set forth in *Peerless* is unlikely unless the surety raises the claim pursuant to a takeover agreement.[139] In any event, contracting officers and legal advisors should note the range of rights afforded sureties during contract administration and address these issues as they arise.

Conclusion

History shows that bid guarantees are necessary to protect the government from unscrupulous offerors who might bid on lucrative projects only to avoid their contractual obligation when the award price appears disadvantageous to them or their sureties. Likewise, experiences of the past have clarified that performance and payment bonds afford the government, materialmen, and laborers a necessary remedy against ill-intentioned or incompetent contractors. Ultimately, however, the statutory and regulatory safeguards are only as effective as the bonds that they mandate. Consequently, contracting officers and legal advisors must promote governmental interests by conscientiously reviewing bonds and ensuring reasoned contract administration.

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[129] *See, e.g., U.S. Fidelity & Guar.*, 16 Cl. Ct. 541.

[130] *Id.* at 543; *see* Ohio Cas. Ins. Co. v. United States, 12 Cl. Ct. 590, 596 (1987) (government liable to surety because contracting officer abused his discretion by failing to terminate contractor in a timely manner).

[131] FAR 52.232-5. The cited provision, entitled Payments under Fixed-Price Construction Contracts, requires this certification. *Id.*

[132] In *Balboa Ins. Co.*, the court set forth eight factors to consider when determining whether the government properly has disbursed funds. They are: 1) attempts by the government, after notice from the surety, to determine that the contractor had the capacity and intent to perform; 2) percentage of contract completed; 3) efforts by the government to determine progress on contract after notice from the surety; 4) whether the contractor subsequently completed the contract; 5) whether the payments to the contractor later reached the subcontractors and materialmen; 6) whether the government knew of problems with the contractor's performance before notice from the surety; 7) whether the government's actions violated one of its own statutes or regulations; and 8) evidence that the contractor could or could not complete the contract as quickly or cheaply as a successor. *Balboa Ins. Co.*, 775 F.2d at 1164-65.

[133] FAR 49.402-3(e)(2).

[134] FAR 49.404(c); *see* United States v. Seaboard Sur. Co., 817 F.2d 956, 959 (2d Cir. 1987).

[135] FAR 49-404(d), (e).

[136] *See* Indiana Lumbermen's Mutual Ins. Co., VABCA No. 2719, 88-3 BCA ¶ 20,865 (dicta); Peerless Ins. Co., ASBCA No. 28887, 88-2 BCA ¶ 20,730; William I. Franklin, GSBCA No. 8606, 88-1 BCA ¶ 20,520 (standing by virtue of suretyship agreement (bond) itself).

[137] *See* Sentry Ins., ASBCA No. 21918, 77-2 BCA 12,721; *see also Johnson Controls*, 713 F.2d 1541 (subcontractors do not have standing to sue in court or enforce an administrative claim).

[138] ASBCA No. 28887, 88-2 BCA ¶ 20,730. Although a takeover agreement appeared in this case, the board did not consider it in its holding. *Id.* at 104,743. In this context, subrogation is an equitable principle by which a surety who extinguishes a principal's obligations under a performance or payment bond accedes to the rights and status of his principal, including privity of contract. *See id.* at 104,739; *see also Balboa Ins. Co.*, 775 F.2d 1158; Westech Corp. v. United States, No. 726-88C (Cl. Ct. July 2, 1990).

[139] *See* Universal Sur. Co. v. United States, 10 Cl. Ct. 794, 797 (1986); Peerless Ins. Co., 88-2 BCA ¶ 20,730 at 104,742. In William I. Franklin, GSBCA No. 8606, 88-1 BCA ¶ 20,520, the board held that the suretyship agreement itself established privity even if the surety had not "performed" under the bond. Thus, the board permitted the surety to contest a termination for default and the assessment of reprocurement costs. *Id.* at 103,737. Some authorities, however, consider this opinion to be an overly liberal reading of precedent governing surety standing and that the ASBCA likely will not adopt it. *See* Indiana Lumbermen's Mutual Ins. Co., VABCA No. 2719, 88-3 BCA ¶ 20,865 at 105,510; Peerless Ins. Co., 88-2 BCA ¶ 20,730 at 104,742; *see also Seaboard Sur. Co.*, 817 F.2d at 961 (Miller Act bond does not create contract subject to the Contract Disputes Act, 41 U.S.C. §§ 601(4), 602(a) (1988)).

DAD Notes

"Counsel" On a Platter

A recent opinion of the Army Court of Military Review examined whether the government satisfied an accused's request for counsel during the course of a custodial interrogation by government agents. In *United States v. Lockwood*[1] the Army Court of Military Review held that when government investigators offer counsel to satisfy a suspect's request for assistance during an interrogation, that counsel must be a lawyer licensed by an American jurisdiction.

While British authorities held him in a London, England, jail for British offenses, agents from the United States Air Force Office of Special Investigations (OSI) interviewed Corporal Lockwood. Corporal Lockwood had a "duty solicitor"—a British public defender—whom a British court had appointed to represent him. The OSI agents contacted that solicitor prior to interviewing Corporal Lockwood and asked the solicitor to accompany them to appellant's cell. The OSI agents informed Corporal Lockwood of his rights,[2] and Corporal Lockwood invoked his right to counsel. Accordingly, to satisfy his request for counsel, the government agents provided the duty solicitor to Lockwood. Corporal Lockwood proceeded to make oral admissions regarding military charges of absence without authority and writing worthless checks with the intent to defraud.[3] One week later, after Lockwood's release from the British jail, another OSI interview occurred without counsel at an Air Force base in England. Corporal Lockwood made more incriminating oral statements, and when asked to provide a written confession, he specifically requested military counsel.

At trial, defense counsel moved to suppress the pretrial statements on the grounds that the government denied the accused counsel required under Military Rule of Evidence 305.[4] The military judge denied the motion and ruled the accused had not requested legal representation other than that provided to him and that he chose to waive his right to counsel and make incriminatory statements.

The Army Court of Military Review rejected the trial judge's ruling and found that the OSI agents had foisted an unqualified counsel upon the accused. The court stated, "[t]he government cannot sponsor a person as 'counsel' who in fact is not so qualified and then find that the suspect waived his right to the assistance of counsel for interrogation."[5]

The Army court predicated its decision upon well-established military law. The court noted that law enforcement officers must give counsel warnings to suspects during a custodial interrogation.[6] Military Rule of Evidence 305(d) codified counsel rights and warnings required by *Miranda.* Furthermore, Uniform Code of Military Justice (UCMJ), article 27(b), states that a defense counsel "must be a judge advocate ... or must be a member of the bar of a Federal court or of the highest court of a state." The culmination of this analysis was the court's holding that "when the government serves up 'counsel' on a platter, it implicitly warrants that 'counsel' meets the requirements of UCMJ Article 27(b)."[7]

Finally, the court found that the government failed to prove that Corporal Lockwood had waived intelligently his right to counsel. "The police investigators warranted that the British solicitor would 'suffice'; any waiver based on that supposition was invalid."[8] Accordingly, the court ruled that Lockwood's oral admissions were inadmissible.[9]

While a scenario such as in *Lockwood* does not occur with any great frequency in military practice, trial defense counsel should not read *Lockwood* so narrowly

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[1] CM 8900413 (A.C.M.R. 11 July 1990).

[2] Uniform Code of Military Justice art. 31, 10 U.S.C. § 831 (1982) [hereinafter UCMJ].

[3] UCMJ arts. 86, 123a.

[4] Manual for Courts-Martial, United States, 1984 [hereinafter MCM, 1984], Mil. R. Evid. 305 [hereinafter Mil. R. Evid.].

[5] *Lockwood*, slip. op. at 2.

[6] Miranda v. Arizona, 384 U.S. 436 (1966); United States v. Tempia, 37 C.M.R. 249 (C.M.A. 1967).

[7] *Lockwood*, slip. op. at 3.

[8] *Id.*

[9] *Id.* at 4; *see* Edwards v. Arizona, 451 U.S. 477 (1981), *reh'g denied*, 452 U.S. 973 (1981).

as to confine the holding to apply only overseas. Indeed, trial defense counsel must be alert to the qualifications of anyone the government provides to render assistance to a soldier who has invoked his right to counsel. *Lockwood* also serves as a reminder to counsel in the field to be creative, to be analytical of situations involving their clients, and to preserve potential issues for appellate review—a duty that counsel occasionally lose in the pressures of everyday business and in the confusion of preparing for and trying a case. Captain W. Renn Gade.

Is There a Doctor in the House?: Medical Statements Exception to the Hearsay Rule

In a recent unpublished decision, *United States v. Hansen*,[10] the Army Court of Military Review revisited three important precedents involving the medical diagnosis or treatment exception[11] to the hearsay rule.[12] The Army court held that for the hearsay exception relating to statements made for the purpose of medical treatment to apply: 1) a person rendering medical care must tell a declarant that medical personnel are treating the declarant for a physical or emotional disorder, or 2) the declarant must otherwise understand in some way that he or she is speaking for treatment purposes.[13] The decision relied on the scope of the exception under Military Rule Evidence 803(4) as outlined by the Court of Military Appeals in *United States v. Deland*,[14] by the Army court in *United States v. Evans*,[15] and by the Navy-Marine Corps Court of Military Review in *United States v. Quarles*.[16]

In *Hansen* Ms. W, a "Child Protective Services Specialist" for the Texas Department of Human Services and Child Protective Services, acted on an allegation that the accused's wife had physically and emotionally abused his five-year-old daughter, V, and that V had been playing "sexually" with Barbie dolls.[17] Ms. W interviewed V on two occasions. V was not responsive to Ms. W's questions during the first interview. During the second interview, Ms. W gave V anatomically correct dolls. V named the male doll "Daddy" and the female doll "V", placed the "Daddy" doll on top of the "V" doll, tried to insert the male doll's penis into the female doll's vagina, and said "Daddy" did the same thing to her.[18] A subsequent physical examination of V revealed no evidence of penetration or sexual trauma. The accused, after initially denying the allegations, admitted that he had "sexual thoughts" about his daughter on two occasions, and that he had rubbed his erect penis between her legs once when she crawled into bed between his wife and him as they slept.[19]

The Army court reviewed the entire record and found it "devoid of any evidence or inferences that V was ever told that she was being treated for any physical or emotional disorder or that she in any way understood that she was speaking for treatment purposes."[20] The court further noted that although the evidence indicated that Ms. W was interested in diagnosis and referral for treatment, "the record [did] not reflect that V was *either told or understood* the purpose of the interview."[21] The Army court held that the trial court improperly admitted Ms. W's testimony, and, because no corroboration of the accused's admissions existed outside of the improperly admitted hearsay, the court could not convict the accused.[22]

In *Hansen* the Army court properly applied previous holdings and focused on the declarant's understanding and motives as the basis for determining admissibility of the hearsay evidence. In *Deland* the Court of Military Appeals held that the premise of Military Rule of Evidence 803(4) is that a patient seeking diagnosis or treatment from a physician has an incentive to be truthful because the patient will believe that by telling the truth he or she will facilitate the doctor's task. The patient obviously has some expectation of benefiting in this way

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[10]CM 8802346 (A.C.M.R. 20 June 1990) (unpub.).

[11]Mil. R. Evid. 803(4).

[12]Mil. R. Evid. 802.

[13]*Hansen*, slip op. at 3.

[14]22 M.J. 70 (C.M.A. 1986), *cert. denied*, 479 U.S. 856 (1986).

[15]23 M.J. 665 (A.C.M.R. 1986).

[16]25 M.J. 761 (N.M.C.M.R. 1987).

[17]*Hansen*, slip op. at 1.

[18]*Id.* at 1-2.

[19]*Id.* at 2.

[20]*Id.* at 3.

[21]*Id.* at 3 (emphasis added).

[22]*Id.* at 4; *see* Mil. R. Evid. 304(g).

when he or she makes the statement.[23] Accordingly, the guarantee of trustworthiness in statements that a patient makes under the belief that he or she will accrue some medical benefit supports admission of the hearsay statements. Likewise, unless the patient clearly makes the extrajudicial statement with some expectation of receiving some medical benefit from the medical diagnosis or treatment that he or she seeks, it will be inadmissible.[24] In *Quarles* the Navy court discussed the foundational requirements that the government must satisfy prior to admitting a statement under Rule 803(4):

> First, the statements made must reasonably relate to the medical diagnosis or treatment. Second, the statement must have been "clearly made" with some expectation of receiving medical benefit from the treatment being sought. Third, the military judge "must determine that the statements were elicited under circumstances which made it apparent *to the patient* that the [doctor] desired truthful information and that only by speaking truthfully would he receive the desired benefits of the consultation.[25]

The burden to establish this foundation clearly is on the government as the moving party.[26]

Defense counsel should be alert and ensure that the government meets its foundational burden under Military Rule of Evidence 803(4). This foundation should include an affirmative showing that the declarant made the statements that the government seeks to admit with an orientation more toward diagnosis or treatment than toward trial preparation.[27] Defense counsel should note that these "statements" may include the declarant's actions with anatomically correct dolls.[28] Additionally, although to whom the declarant made the statements is not necessarily significant,[29] the declarant's motives in making the statement, as well as the declarant's understanding of why someone is questioning him or her (based on the totality of the circumstances), will be the important factors with respect to admissibility. CPT Michael P. Moran.

"I Was Just Throwing It Away!": Innocent Possession Can Be a Defense

An accused walks into his defense counsel's office just after his commander charged him with possessing marijuana in the hashish form and violating a lawful general regulation for possessing drug paraphernalia.[30] He tells his attorney that this unfortunate set of circumstances began when he moved into a new room in the barracks and was cleaning up for the first time. While cleaning the recesses of a top shelf in a common area of the room, the accused discovered a soda can that was crushed on top, had several holes punched in the top, and had burn marks in the center. The accused, realizing this soda can was probably a smoking device for use with hashish, immediately crushed the smoking device with his foot and then threw it in the trash receptacle in his room. He later explained to his defense counsel that his intent was to throw the can away with the rest of the trash the next day. However, the next morning, as the accused was about to remove the trash from his room, the first sergeant told the accused to put the bag down and fall out for an inspection formation. While the accused's unit was in formation, the military police walked through the billets with drug detection dogs. The dogs alerted on the accused's trash can, allowing the military police to discover the soda can containing hashish residue.

After the defense counsel discussed this predicament with his client, the accused decided that he should plead guilty to the charges because no question existed that the military police found the accused in possession of the contraband. At trial, during the providence inquiry, the accused told the military judge that he crushed the can and threw it away so nobody would get in trouble. He further explained to the military judge that he would have discarded the can in the dumpster the next morning but for the early wake-up and inspection.

At this point, the military judge asked the defense counsel about the existence of any defenses. The defense

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[23] *Deland*, 22 M.J. at 72-73.

[24] *Id.* at 75.

[25] *Quarles*, 25 M.J. at 772 (N.M.C.M.R. 1987) (emphasis in original) (quoting United States v. Deland, 22 M.J. at 73).

[26] United States v. Williamson, 26 M.J. 115, 118 (C.M.A. 1988).

[27] *Evans*, 23 M.J. at 676; *see Deland*, 22 M.J. at 75.

[28] 23 M.J. at 676; *see* Mil. R. Evid. 801(a) ("statement" includes nonverbal conduct of person if person intends it to be an assertion).

[29] *Evans*, 23 M.J. at 674 (that declarant makes statement to nonphysician does not matter so long as declarant's motive is to promote diagnosis or treatment because declarant's motive guarantees trustworthiness). In *United States v. Welch*, 25 M.J. 23, 25 (C.M.A. 1987), the court held that Military Rule of Evidence 803(4) and its federal counterpart, Federal Rule of Evidence 803(4), contained "no language which limits their applicability to medically licensed doctors" and stated that the drafters of both these rules specifically envisioned that they might include statements made to hospital attendants, ambulance drivers, or even members of the family within the rules.

[30] *See* UCMJ arts. 112a, 92.

counsel replied that in his opinion, the sole issue was the accused's possession of the can. He had not looked into the nature or intent of the possession by his client.

In *United States v. McDaniels*[31] the Army Court of Military Review recently considered the fact situation just described. On appeal, the accused contended that his plea was improvident because his comments at trial raised the defense of innocent possession. The Army court agreed, finding that the accused's uncontradicted statements that he found the smoking device in a common area and that he would have disposed of it in the dumpster the next morning had it not been for the early morning wake-up and inspection, made his plea improvident. The court stated this scenario raised the possible defense of innocent possession.[32]

A trial defense counsel, when faced with this type of charge, needs to be concerned not only with whether the client was in possession of contraband, but also whether that possession was illegal. Contrary to the assertions by the defense counsel in the *McDaniels* case, considering the accused's intent when he possessed the illegal drug is just as important as the fact of possession itself. Though the Army court did not rule specifically whether the defense of innocent possession would be successful in this case, a review of *United States v. Kunkle*[33] clearly indicates that the defense counsel could have made a convincing argument. If defense counsel determines this defense would not be successful at trial, he or she should take the necessary steps to ensure that the client's plea will be provident. CPT Michael W. Meier.

Idaho v. Wright: Residual Hearsay Versus the Confrontation Clause

The United States Supreme Court, in the recent case of *Idaho v. Wright*,[34] significantly changed the law regarding the standards for determining whether adequate indicia of reliability exist to warrant the admission of hearsay statements of a declarant who is unavailable. The state charged the defendants, Laura Wright, and her boyfriend, Robert L. Giles, with two counts of lewd conduct with a minor. Specifically, the state alleged that Ms. Wright held down her daughters, aged five and two, and covered their mouths while Giles engaged in sexual intercourse with the girls. At trial, after questioning the youngest child, the judge held that she was unable to communicate with the jury. In light of the ruling, the prosecution sought to introduce hearsay statements of the girl through the testimony of the examining physician. The trial court found the statements to be admissable under Idaho's residual hearsay rule.[35] Ms. Wright appealed, arguing that introduction of the statements violated the confrontation clause.[36] The Idaho Supreme Court agreed and overturned the conviction.[37] The State of Idaho appealed.

A divided Supreme Court affirmed the Idaho Supreme Court's reversal. The Court held that when hearsay statements do not fall within one of the firmly-rooted exceptions,[38] to be admissable under the confrontation clause, the government must show that the statements have "particularized guarantees of trustworthiness" based on the totality of circumstances surrounding the making of the statement.[39] The Court specifically rejected Idaho's argument that corroborating evidence unrelated to the making of the hearsay statements may support a finding that the statements have adequate indicia of reliability. Rather, the Court held that Idaho's argument would permit the admission of presumptively unreliable statements by bootstrapping them on the trustworthiness of other evidence.[40] The Court found that this practice would negate the requirement that hearsay declarations admitted under the confrontation clause be so trustworthy as to justify the denial of cross-examination.[41]

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[31] CM 8903378 (A.C.M.R. 25 July 1990) (unpub.).

[32] R.C.M. 910(e) discussion; *McDaniels*, slip. op. at 2.

[33] 23 M.J. 213 (C.M.A. 1987). The Court of Military Appeals held that possession accompanied by an intent to destroy the contraband would seem "innocent," because the intended destruction would protect others from potential harm due to the drugs. Certainly, a person's taking possession of drugs to destroy them conforms more with a policy of the prohibition against use of drugs than for him to leave them where they might fall in the hands of a user.

[34] 110 S. Ct. 3139 (1990).

[35] Idaho R. Evid. 803(24).

[36] U.S. Const. amend VI.

[37] 116 Idaho 382, 775 P.2d 1224 (1989).

[38] The Supreme Court specifically found that Idaho's residual hearsay rule did not fall within the firmly rooted exceptions because it accommodates instances in which statements not falling within recognized hearsay exceptions might nevertheless be sufficiently reliable to be admissible. 110 S. Ct. at 3147.

[39] 110 S. Ct. at 3148.

[40] *Id.* at 3150.

[41] *Id.*

Relying on its opinion in *Ohio v. Roberts*,[42] the Supreme Court set out a two-part test for determining when declarations admissible under an exception to the hearsay rule also meet the requirements of the confrontation clause: 1) the prosecution either must produce or must demonstrate the unavailability of the declarant; and 2) the statement must either fall within a firmly-rooted exception of the hearsay rule, or the moving party must show "particularized guarantees of trustworthiness" such that cross-examination would be of "marginal utility."[43] The Court set out a number of factors surrounding the making of the declaration that a court may consider in determining whether "particularized guarantees of trustworthiness" exist. Those factors included spontaneity of the statement, consistent repetition of the matter asserted, the mental state of the declarant, use of terminology unexpected of a child of similar age, and lack of a motive to fabricate.[44]

The *Idaho v. Wright* decision nullifies previous decisions from federal, state, and military courts which had held that, when viewing the totality of circumstances, a court may use corroborating evidence unrelated to the circumstances surrounding the making of the statement to support a finding that the statement is reliable.[45] Further, the decision is particularly applicable to courts-martial practice because the military, like Idaho, adopted the residual hearsay rules without change from the Federal Rules of Evidence.[46]

Defense counsel in the field should note this case and be prepared when trial counsel seek to admit statements from an unavailable witness under Military Rules of Evidence 803(24) or 804(b)(5). In these situations, defense counsel should force trial counsel to articulate specific factors directly relating to the making of the declaration that would support a finding that "particularized guarantees of trustworthiness" exist. Captain Lauren B. Leeker.

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[42] 448 U.S. 56 (1980).

[43] 110 S. Ct. at 3146.

[44] *Id.* at 3150.

[45] *See, e.g.*, United States v. Dorian, 803 F.2d 1439, 1445 (8th 1986); State v. Allen, 157 Ariz. 165, 176-178, 755 P.2d 1153, 1164-66 (1988); State v. Bellotti, 383 N.W.2d 308, 315 (Minn. Ct. App. 1985); State v. Doe, 94 N.M. 637, 639, 614 P.2d 1086, 1088 (N.M. Ct. App. 1980); State v. McCafferty, 356 N.W.2d 159, 164 (S.D. 1984); United States v. Hines, 23 M.J. 125 (C.M.A. 1986); United States v. Quick, 22 M.J. 722, 724 (A.C.M.R. 1986).

[46] *See* Mil. R. Evid. 803(24) analysis at A22-51; Fed. R. Evid. 803(24).

Government Appellate Division Note

Standards of Appellate Review and Article 66(c): A De Novo Review?

Major Martin D. Carpenter
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Introduction

In prosecuting a criminal case, the government's interests in maintaining good order and discipline within the service and the protection of society do not begin with the opening of the court-martial, nor do they end with a finding of guilty and the announcement of a sentence. The government has not protected fully its interests until an appellate court affirms the accused's court-martial conviction. Trial counsel and chiefs of military justice must examine the case with a critical eye from the first report of a criminal violation through action by the convening authority. They must do more than obtain a guilty verdict from the military judge or the members of the court. They must be aware that upon appellate review the Army Court of Military Review has a specific mandate pursuant to Uniform Code of Military Justice (UCMJ) article 66(c), which provides that:

> In a case referred to it, the Court of Military Review may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.[1]

Pursuant to this mandate, the appellate judges on the Army Court of Military Review actively review courts-martial for legal and factual sufficiency, reassess sentences, and specify issues not raised at trial or on appeal.[2]

Significantly, many of the judges who currently preside on the Army Court of Military Review gained their military justice experience and developed their judicial philosophies against the backdrop of the pre-1984 Manual for Courts-Martial provisions that required exhaustive pretrial advice and post-trial review.[3] Some appellate judges may believe that courts-martial currently do not receive the same degree of scrutiny by staff judge advocates as they have in the past,[4] but the perception of these judges is not correct. The mandate of article 66(c) and the degree of activity in the appellate review of cases by the Army Court of Military Review demonstrates that the Army court actually performs a de novo[5] review process.

This article will examine the standards of appellate review with regard to legal and factual sufficiency of courts-martial findings by discussing the United States Supreme Court standard, the United States Court of Military Appeals standard,[6] and the Army Court of Military Review standard.[7] The article follows with a discussion of *United States v. Johnson*,[8] a case that demonstrates the magnitude of Army court's power as prescribed by article 66(c), and a short discussion of the propriety of the court's use of that power. The author intends this article to reacquaint government counsel with the notion that counsel must protect the record of trial from avoidable trial errors and make an adequate record that will withstand appellate review. By protecting the record and assuring its adequacy, government counsel will lessen the likelihood that the Army court will overturn an accused's conviction on appeal.

Government counsel must place on the record sufficient evidence to overcome legal errors that result from an inadequate record. Sufficient evidence must appear on the record to support the military judge's findings of fact on a particular conclusion of law. Having sufficient evidence on the record protects against the Army Court of Military Review's conducting a de novo review during its appellate examination of the case.

The United States Supreme Court Standard

In *Jackson v. Virginia*[9] the Supreme Court examined *In re Winship*,[10] which established the principle that

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[1] Uniform Code of Military Justice art. 66(c), 10 U.S.C. § 866(c) (1982) [hereinafter UCMJ].

[2] *E.g.*, United States v. Johnson, 30 M.J. 930 (A.C.M.R. 1990).

[3] The promulgation of the 1984 Manual for Courts-Martial (Manual) relieved the government of the burden of performing exhaustive reviews of courts-martial cases in the pretrial advice or post-trial review that the staff judge advocate submitted to the court-martial convening authority. *See* UCMJ arts. 34, 64; Manual for Courts-Martial, United States, 1984, Rules for Courts-Martial 406, 1106 [hereinafter R.C.M.]. Article 32, UCMJ, formerly required the staff judge advocate to review the pretrial investigation evidence in his pretrial advice. Practitioners can best describe the standard that the UCMJ required the staff judge advocate to use as that degree of proof which would convince a reasonable, prudent person that probable cause existed to believe a crime occurred and the accused committed it. *See* United States v. Engle, 1 M.J. 387 (C.M.A. 1976); United States v. Johnson, 40 C.M.R. 451 (A.B.R. 1968). In addition, the UCMJ formerly required the staff judge advocate to perform a post-trial review of courts-martial wherein he had to establish that the evidence presented at trial satisfied all elements of the offenses. *See* United States v. Powis, 8 M.J. 809 (N.C.M.R. 1980); *e.g.*, United States v. Davis, 6 M.J. 874 (A.C.M.R. 1979), *petition denied*, 6 M.J. 234 (C.M.A. 1980). The UCMJ also required the staff judge advocate to opine on the weight of the evidence and to articulate the basis for his opinion in his or her post-trial review.

[4] At the second annual Joint Service Appellate Workshop held at Andrews Air Force Base in January 1990, attendees discussed the standards of review issue in a seminar. The consensus was that all the services apparently had experienced increased litigation on the legal and factual sufficiency of courts-martial findings.

[5] "Trying a matter anew; afresh; a second time; the same as if it had not been heard before and as if no decision had been previously rendered." Black's Law Dictionary 392 (5th ed. 1979).

[6] Generally, three avenues of review exist that will cause the Court of Military Appeals to take jurisdiction of a case. First, the UCMJ provides for automatic appeal from the courts of military review for cases in which the affirmed sentence affects a flag or general officer or extends to death. UCMJ art. 67(b)(1). Second, the Judge Advocate Generals may certify issues raised in cases before the courts of review. UCMJ art. 67(b)(2). Third, the accused may petition the court for review of the lower court's decision, which is the most common avenue of review. UCMJ art. 67(b)(3). The court also exercises extraordinary writ powers. *See* The All Writs Act, 28 U.S.C. § 1651(a) (1982).

[7] The courts of military review take jurisdiction and conduct their review in cases referred to them by the various Judge Advocate Generals. The UCMJ requires the courts of military review to review all cases in which the approved sentence affects a general or flag officer or includes death, punitive discharge, dismissal, or confinement for one or more years. UCMJ art. 66(b). A Judge Advocate General may refer courts-martial, not otherwise reviewable by the courts of review, when he or she determines that the law does not support a part of the findings or sentence, or if he or she otherwise so directs. UCMJ art. 69. These courts also exercise extraordinary writ powers, UCMJ art. 73, and review government appeals pursuant to UCMJ art. 62.

[8] 30 M.J. 930 (A.C.M.R. 1990).

[9] 443 U.S. 307 (1979).

[10] 397 U.S. 358 (1970).

> an essential of the due process guaranteed by the Fourteenth Amendment [is] that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.[11]

In *Jackson* the Court found that the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be the determination of whether the evidence of record could reasonably support a finding of guilt beyond a reasonable doubt.[12] The Court found further that, "A doctrine establishing so fundamental a substantive constitutional standard must also require that the factfinder will rationally apply that standard to the facts in evidence."[13] This inquiry does not require a court to "ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt."[14] In *Jackson* the Court held that "[i]nstead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[15] With this language the Court expressed the minimum constitutional requirement of evidence to support a conviction in a criminal case.

The Supreme Court further explained the rationale that provided the basis for its decision in *Jackson*:

> This familiar standard gives full play to the responsibility of the trier of fact to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from the basic facts to the ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution. The criterion thus impinges upon "jury" discretion only to the extent necessary to guarantee the fundamental protection of due process of law.[16]

Most importantly, however, the *Jackson* Court noted that "[t]he question whether the evidence is constitutionally sufficient is of course wholly unrelated to the question of how rationally the verdict was actually reached."[17] Further, the Court expressed its disapproval with appellate courts' substituting their judgment for that of the lower courts by stating, "[j]ust as the standard announced today does not permit a court to make its own subjective determination of guilt or innocence, it does not require scrutiny of the reasoning process actually used by the factfinder—if known."[18]

The Supreme Court standard of appellate review provides the minimum constitutional standard that appellate courts must apply in a criminal cases. Of course this standard is not necessarily applicable to courts-martial and military criminal procedure since courts-martial are article I courts, not article III courts.[19] In *United States v. Turner*,[20] however, the United States Court of Military Appeals adopted the *Jackson* standard, as did the Army Court of Military Review in *United States v. Rath*.[21]

The Court of Military Appeals Standard

In *United States v. Albright*[22] the Court of Military Appeals found the government's evidence sufficient to sustain the findings of guilt as a matter of law. The court noted that the members had heard the testimony of the witnesses and had sat in a superior position to observe the personal demeanor of each witness, to judge the credibility of the witnesses' testimony, and to be able to accept or reject the testimony after evaluating its truthfulness according to their own judgment. *Albright* established that unless the accused's conviction rested upon an error as a matter of law, appellate courts will not overturn cases attacking the legal sufficiency of a lower court's findings. The *Albright* court held that, "[w]e have long

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[11] *Jackson*, 443 U.S. at 316.

[12] *Id.* at 317.

[13] *Id.* at 317 n.8.

[14] Woodby v. INS, 385 U.S. 276 (1966) (emphasis added).

[15] *Jackson*, 443 U.S. at 319 (emphasis in original).

[16] *Id.*

[17] *Id.* at 319 n.13.

[18] *Id.* at 320 n.13. *See generally* 3 F. Wharton, Criminal Procedure 520 (12th ed. 1975 and Supp. 1978).

[19] U.S. Const. arts. I, III.

[20] 25 M.J. 324, 325 (C.M.A. 1987).

[21] 27 M.J. 600, 604 (A.C.M.R. 1988), *petition denied*, 29 M.J. 284 (C.M.A. 1989); *see also* United States v. Hart, 25 M.J. 143 (C.M.A. 1987).

[22] 26 C.M.R. 408 (C.M.A. 1958).

adhered to the judicial principle of appellate review that it is not our proper function to reweigh the credibility of a witness and to determine independently the credence to be afforded the testimony of each witness."[23]

After *Albright* the Court of Military Appeals, in *United States v. Turner*,[24] addressed the standard of appellate review that the various courts of military review should use. The *Turner* court found that the Navy-Marine Corps Court of Military Review had a duty to determine not only the legal sufficiency of the evidence, but also the factual sufficiency of the evidence pursuant to article 66(c). As to legal sufficiency, the court applied the *Jackson* standard of whether, considering the evidence in the light most favorable to the government, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt. The court next examined the factual sufficiency standard of the courts of military review. The court articulated that test as whether "after weighing the evidence in the record of trial and making allowances for not having personally observed the witness, the members of the Court[s] of Military Review are themselves convinced of the accused's guilt beyond a reasonable doubt."[25] The Court of Military Appeals found that article 66(c) granted appellants an important appellate safeguard. The court held that "if the court[s] below failed to perform this review, then the appellant was deprived of an important safeguard; and, in that event, the case should be remanded to the Court[s] of Military Review for completion of a factual review of the findings of guilty."[26]

The *Turner* court established that it would defer to the findings of fact as determined by the courts of military review pursuant to article 66(c). The Court of Military Appeals, however, has on occasion failed to apply this standard of appellate review. The Court of Military Appeals has found the factual determinations made by the courts of military review to be binding during its review of a case on appeal;[27] "[h]owever, from time to time and not without self-criticism, the [c]ourt has released itself from this legal straitjacket."[28] Thus, the court has reviewed cases in which the issue presented involved questions of fact.

The Court of Military Appeals recently reaffirmed the principle that it would entertain only those issues involving questions of law that the courts of military review addressed in *United States v. Roach*.[29] In *Roach* the Court of Military Appeals held that "this is a court of law and the introduction of such a consideration [of a question a fact] for the first time [on appeal] before us is most inappropriate."[30] The law generally limits consideration of such issues of fact—issues that the accused potentially waived—to situations involving mixed questions of law and fact and to cases in which a miscarriage of justice may result without the court addressing the matter.[31] This limitation effectively controls the orderly administration of military justice at the appellate level, but, as noted previously, some unique cases do occur from time to time.

The Army Court of Military Review Standard

The statutory review authority granted to the various courts of military review is peculiar only to those appellate criminal courts and is "uniquely broader than that afforded most appellate courts."[32] Pursuant to article 66(c), "[a] Court of Military Review has independent fact-finding power. In the exercise of that power, the court can weigh the evidence ... and determine controverted questions of fact differently from the court-martial."[33] In *Rath* the Army Court of Military Review adopted the standard of review procedures announced in *Jackson* and *Turner*.[34] The Army Court of Military Review, however, did not address what impact article 66(c) might have on the court's standard of review while adopting these "new" standards of appellate review procedures.

In *Johnson* the Army Court of Military Review specified the issue of whether the evidence of record was

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[23] *Id.* at 411 (citing United v. Taylor, 19 C.M.R. 71 (C.M.A. 1955)); *see also* UCMJ art. 67(d).

[24] *Turner*, 25 M.J. at 324.

[25] *Id.* at 325.

[26] *Id.*

[27] United States v. Alaniz, 26 C.M.R. 313, 317 (C.M.A. 1958) ("we may not overturn a truly factual determination based upon the evidence of record made by intermediate appellate bodies possessed of fact-finding jurisdiction"); *see also* United States v. Lowry, 2 M.J. 55 (C.M.A. 1976); United States v. Flagg, 29 C.M.R. 452 (C.M.A. 1960) (whether a case involves mixed questions of law and fact is reviewable by the court).

[28] *Johnson*, 30 M.J. at 934 n.2.

[29] 29 M.J. 33 (C.M.A. 1989).

[30] *Id.* at 37. *But cf.* United States v. Miller, 28 M.J. 998 (A.C.M.R. 1989), *petition granted*, 30 M.J. 48 (C.M.A. 1990) (specifying from the bench at close of appellate argument issue that government waived at trial and before the Army Court of Military Review).

[31] *See supra* note 27.

[32] *Johnson*, 30 M.J. at 934.

[33] UCMJ art. 66(c); United States v. Baldwin, 37 C.M.R. 336 (C.M.A. 1967); United States v. Remele, 33 C.M.R. 149 (C.M.A. 1963).

[34] 27 M.J. at 604.

sufficient to support Johnson's conviction of larceny, conspiracy to commit larceny, and false official statements by a general court-martial composed of officer and enlisted members.[35] Neither Johnson's pleadings before the Army court, his request for appellate review, nor his post-trial submissions to the convening authority, raised the issues of legal and factual sufficiency of his convictions.[36]

At trial, the government alleged that Johnson conspired with the noncommissioned officer in charge (NCOIC) of the local finance and accounting office to defraud the United States of currency. Pursuant to their scheme, Johnson filed false documents for advance pay through the NCOIC who completed the required official documents (DA Forms 2139). The NCOIC did not require Johnson to sign the documents, and he made several payments to Johnson. The NCOIC then concealed the existence of the unauthorized transactions through other substantiating official document vouchers (DA Forms 4444-R). Johnson, as did the NCOIC, maintained that he was not aware of the criminality of the NCOIC's actions and contended that he was not aware of the contents of the documents prepared by the NCOIC. Johnson's finance records disclosed that in August 1987, he was indebted to the United States in the amount of $1,884 as a result of previously having received advanced pay. Over the succeeding seven months, Johnson requested and received casual pay on twenty-two occasions in amounts ranging from $300 to $1,500, for a total of $16,000. Pursuant to an audit of the finance office, a Criminal Investigation Command agent concluded that finance regulations did not authorize Johnson to receive casual pay.

Johnson rendered a sworn statement and admitted at trial that he had substantial debts, that he received no pay because of the multiple advanced payments he previously accepted, and that he received the advanced payments from the NCOIC. In a separate trial, a court-martial convicted the NCOIC, pursuant to his plea, of wrongful appropriation of $34,250 from the United States by making false documents for Johnson and eight other soldiers. The NCOIC testified at Johnson's trial that he had lied for Johnson in the past, but that Johnson was not aware that the documents were false and that no conspiracy existed.

The Army court in *Johnson* found that no direct evidence of record existed to prove appellant's guilt of any of the offenses. Further, the court found that insufficient circumstantial evidence appeared on the record to support the court-martial finding.[37] The court found, "[s]pecifically, there is no evidence that appellant made an illicit agreement with anyone or possessed the requisite *mens rea* to commit larceny. Nor is there direct evidence that appellant signed an official document with intent to deceive or defraud or aided and abetted another in so doing."[38] The court went on to find that no circumstantial evidence existed either; accordingly, the court set aside the findings of guilty and the sentence, and it dismissed the charges.[39]

The *Johnson* court examined the applicable legal principles that appellate courts should apply during the appellate review of a criminal trial to determine the legal and factual sufficiency of the evidence in Johnson's case. The court employed the principles of *Jackson, Albright,* and *Turner*. The court held that the language in article 66(c), which cautions the appellate courts to give deference to the fact that the court below saw and heard the witnesses, circumscribes its power to overturn a court-martial's factual findings. The court held, "[t]hus, in cases where credibility plays a critical role in the outcome of the trial, we hesitate to second-guess the court's findings."[40] Despite the court's hesitance to second-guess the court-martial's findings it further held that, "[c]onversely, where those findings do not depend on the court's observation of the witnesses, our independence as a factfinder should only be constrained by the evidence of record and the logical inferences emanating therefrom."[41] In addition to its decision in *Johnson*, the Army Court of Military Review has exercised its extraordinary powers of appellate review in other cases involving serious and aggravated crimes.[42]

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[35] 30 M.J. at 930.

[36] *Id.* Johnson, however, did preserve the issue by making the obligatory motion for a finding of not guilty at the close of the government's case at trial. *Id.*

[37] *Id.* at 933.

[38] *Id.* The government conceded that Johnson physically did not sign the official finance documents himself. The government's theory of the case was that Johnson acted in concert with the unit finance clerk who signed the documents. *Id.*

[39] *Id.* at 943.

[40] *Id.* at 934 (citing *Albright*, 26 C.M.R. at 408).

[41] *Id.* at 934 (citing *Turner*, 25 M.J. at 324); *accord* United States v. Cooper, 28 M.J. 810 (A.C.M.R. 1989).

[42] *See, e.g.*, United States v. Asfeld, 30 M.J. 917 (A.C.M.R. 1990) (violating lawful general regulation, communicating indecent language, obstructing justice, and soliciting adultery convictions reversed); United States v. Bonano-Torres, 29 M.J. 845 (A.C.M.R. 1989), *certificate for review filed*, 29 M.J. 463 (C.M.A. 1990) (assault and battery and rape convictions reversed).

Practice Points

The *Johnson* case indicates that the Army Court of Military Review apparently exercises its power as prescribed by article 66(c) often and in a manner that amounts to a de novo review. Perhaps the Army court's use of this power is one of the few paternalistic rubrics remaining from the 1969 and 1951 Manuals for Courts-Martial.[43] Those protections may have been necessary when regular line officers, whom the Army did not train and whom state bars had not licensed, were prosecuting, defending, and sitting as the president in courts-martial. Under our current system, however, the need for the unique factfinding power prescribed by article 66(c) clearly no longer is a required procedure for the protection of the rights of appellants.

Courts should consider issues that parties fail to raise as waived.[44] In reality though, appellate courts resurrect issues that parties apparently waived at trial because the parties below did not address the issues adequately. Often, at trial, the evidence of record raises significant legal issues, but trial counsel do not address these issues for fear of protracting litigation or injecting error into the record. The defense, therefore, receives a windfall because the evidence of record does not establish clearly that the accused waived the issue or that the issue has no merit. Subsequently, on appeal, the Army Court of Military Review invokes article 66(c) and addresses or specifies the issue. The problem for the government on appeal is that 1) the record of trial does not disclose sufficient evidence of record for the government to demonstrate on appeal that the issue has no merit without resorting to a myriad of legal fictions and factual assumptions, or 2) the record does not reflect the evidence that impacts on the issue raised in a light most favorable to the government. The Army Court of Military Review should resolve questions of law—and questions of fact that determine a question of law—without weighing the credibility of witnesses from a cold and sterile record of trial. Accordingly, the court apparently is not giving "due deference" to the findings of courts-martial.

Inasmuch as the Army Court of Military Review aggressively exercises its article 66(c) powers and the court's exercise of that prerogative normally does not inure to the government's benefit, trial counsel should note that "to avoid needless appellate issues and the attendant risk of reversal on appeal, an experienced prosecutor will weigh the factors involved that will, in many cases counsel a prudent course of action."[45] Government counsel should be aware that *Johnson* illustrates that if appellate defense counsel do not raise and argue factual sufficiency, the Army court may decide a controverted issue of fact against the government. Axiomatically, "the law does not require that a defendant receive a perfect trial, but a fair one, for there are no perfect trials."[46] The government's interests in prosecuting an accused will receive the best protection from government counsel who are fully aware of the facts in evidence, who are aware of the law that applies to the issues presented, and who are aware that the Army Court of Military Review may subject the case to a de novo review on appeal.

[43] *See* United States v. Drexler, 26 C.M.R. 185, 186 (C.M.A. 1958) (Latimer, J., dissenting) (questioning the propriety of article 66(c) based on legislative history and congressional intent).

[44] *See* Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 103 analysis, app. 22, at A22-2; UCMJ art. 67(d).

[45] United States V. Guthrie, 25 M.J. 808, 810 (A.C.M.R. 1988).

[46] Michigan v. Tucker, 417 U.S. 433, 446 (1974); Bruton v. United States, 391 U.S. 123, 135 (1968).

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

Criminal Law Notes

Dereliction of Duty and Weather Reports[1]

Introduction

Of all the offenses proscribed by Uniform Code of Military Justice,[2] perhaps the most incompatible with civilian life is dereliction of duty.[3] Although poor job performance by a civilian worker may be grounds for terminating employment or taking other adverse administrative actions against the worker, rarely would job related conduct serve as a basis for imposing criminal

[1] Much of the source material for this note comes from the Criminal Law Deskbook. *See* Criminal Law Division, The Judge Advocate General's School, U.S. Army, Criminal Law: Crimes & Defenses, at 1-107 to 1-109. The Criminal Law Division, The Judge Advocate General's School, United States Army, publishes the deskbook and updates it annually. Persons interested in obtaining a copy of this deskbook can order it through the Defense Technical Information Center. The procedures for ordering the deskbook appear in the Current Material of Interest section of *The Army Lawyer*.

[2] 10 U.S.C. §§ 801-940 (1982) [hereinafter UCMJ].

[3] *See* UCMJ art. 92(3).

sanctions.[4] Military law, on the other hand, provides that dereliction of duty, even if unintentional, can result in a federal criminal conviction and imprisonment.[5]

The most recent decision by the Court of Military Appeals to address dereliction of duty is *United States v. Dellarosa*.[6] This case provides useful guidance regarding the scope of the offense and the circumstances that will support a conviction for dereliction of duty. Before discussing the specific facts of *Dellarosa* in detail, a brief review of dereliction of duty is appropriate.

Dereliction of Duty Generally

The Manual for Courts-Martial (Manual) provides that dereliction of duty has the following three elements of proof:

(1) That the accused had certain duties;

(2) That the accused had knowledge of the duties; and

(3) That the accused, either willfully, through neglect, or by culpable inefficiency, was derelict in the performance of those duties.[7]

With respect to the first element of proof, the potential sources of the duty that can serve as the basis for a conviction under article 92(3) are almost boundless. The Manual instructs that the "duty may be imposed by treaty, statute, regulation, lawful order, standard operating procedure, or custom of the service."[8] In *United States v. Nickels*,[9] for example, the Court of Military Appeals found that an Air Force regulation imposed a duty upon the accused, a fund custodian, to audit funds periodically and to maintain proper fiscal control over them.[10] In *United States v. Heyward*[11] the court concluded that a custom of the service, in addition to an Air Force regulation, imposed a duty upon the accused, a noncommissioned officer (NCO), to report drug abuse by others.[12] On the other hand, "duty" for purposes of article 92(3) does not include a "non-military dut[y] voluntarily performed for additional pay after regularly assigned duty hours. . . ."[13]

The second element of dereliction of duty requires that the accused have "actual knowledge" of the duty at issue.[14] In contrast to the 1984 Manual, the 1969 Manual[15] provided that actual knowledge was a requirement only for willful dereliction of duties.[16] The drafters of the 1984 Manual, however, relying on an earlier decision by the Court of Military Appeals,[17] made the accused's knowledge of the duties a requirement for all derelictions, including those based upon negligence and culpable inefficiency.[18] An important consequence of this change is that state of mind defenses, such as voluntary intoxication, now are potentially available for all dereliction of duty offenses.[19]

As the third element of proof reflects, the standard for dereliction is three-fold. First, dereliction of duty may be

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[4] A civilian worker's failure to perform properly on the job might, in an unusual case, be the basis for criminal sanctions. The law, however, generally limits these situations to dangerous or risky employment (for example, selling firearms or liquor), and to physical suffering or economic harm caused by "poor job performance" (for example, when a doctor recklessly injures a patient during surgery or a company recklessly damages the environment by a chemical spill). Unlike the military, the law does not punish dereliction of duties—that is, poor job performance—by a civilian worker regardless of the sensitivity of the duty or the potential harm that a dereliction might create.

[5] Dereliction through neglect or culpable inefficiency has a maximum permissible punishment of forfeiture of two-third's pay per month for three months and confinement for three months. Manual for Courts-Martial, United States, 1984, Part IV, para. 16e(3)(A) [hereinafter MCM, 1984]. Willful dereliction of duties is punishable by up to a bad-conduct discharge, forfeiture of all pay and allowances, and confinement for six months. *Id.*, Part IV, para. 16e(3)(B). Indeed, the drafters increased the maximum punishment for willful dereliction from three to six months confinement and included a bad-conduct discharge because the offense "involve[d] the flaunting of authority and [is thus] more closely analogous to disobedience offenses." *Id.*, Part IV, para. 16e analysis, app. 21, at A21-89.

[6] 30 M.J. 255 (C.M.A. 1990).

[7] MCM, 1984, Part IV, para. 16b(3).

[8] *Id.*, Part IV, para. 16c(3)(a).

[9] 20 M.J. 225 (C.M.A. 1985).

[10] *Id.* at 225-26; *see also* United States v. Moore, 21 C.M.R. 544, 546 (N.B.R. 1956) (Navy regulation imposed duty on accused to return to his ship).

[11] 22 M.J. 35 (C.M.A. 1986).

[12] *Heyward*, 22 M.J. at 36.

[13] United States v. Garrison, 14 C.M.R. 359, 362 (A.B.R. 1954) (secretary-treasurer of NCO's open mess funds).

[14] MCM, 1984, Part IV, para. 16c(3)(b). The Manual expressly provides that circumstantial evidence can establish such knowledge. *Id.*

[15] Manual for Courts-Martial, United States, 1969 (Rev. ed.) [hereinafter MCM, 1969].

[16] *Id.*, para. 172*c*.

[17] United States v. Curtin, 26 C.M.R. 207 (C.M.A. 1958).

[18] MCM, 1984, Part IV, para. 16c analysis, app. 21, at A21-89.

[19] *See generally* Milhizer, *Voluntary Intoxication as a Criminal Defense Under Military Law*, 127 Mil. L. Rev. 131, 150-51 (1990).

willful. When used in this context, "willful" means "intentional" and "refers to the doing of an act knowingly and purposely, specifically intending the natural and probable consequences of the act."[20] Military case authority, however, generally is not helpful in distinguishing between willful and negligent dereliction, because the maximum punishment for both forms of the offense was identical prior to 1984.[21] For example, although the accused's dereliction in *United States v. Voelker*[22] seemed to be willful,[23] the board wrote that the accused's "action ... was clearly intentional and constituted at least negligent failure to perform his duties if not a willful abandonment thereof."[24]

The second form of dereliction of duty is through negligence. The Manual defines "negligent" as meaning that the "act or omission [was made by] a person who is under a duty to use due care [but] exhibits a lack of that degree of care which a reasonably prudent person would have exercised under the same or similar circumstances."[25] The court found this type of negligence in a case in which an accused service member failed to safeguard adequately classified information,[26] and in another case in which an accused navigator ran his ship aground because he failed to use all available equipment to regularly check his position while trying to maneuver through a narrow passage on a dark night.[27]

Third, dereliction of duty may be arise from a service member's culpably inefficient performance. The Manual defines "culpable inefficiency" as being "inefficiency for which there is no reasonable or just excuse."[28] In *Nickels*,[29] for example, the commander assigned the accused to duties as the custodian of a postal fund and a related account.[30] His duties required him to audit the funds and maintain fiscal control over them. Because of the accused's failure to perform adequately these duties, he lost accountability for approximately $3000 in the account. The court concluded that the accused's culpable inefficiency[31] supported his conviction for dereliction of duties, even though he did not take the money, did not know what had happened to it, and had made arrangements to reimburse the account.[32]

Mere ineptitude, on the other hand, will not support a conviction for dereliction of duty. As the Manual explains:

> A person is not derelict in the performance of duties if the failure to perform those duties is caused by ineptitude rather than by willfulness, negligence, or culpable inefficiency, and may not be charged under this article, or otherwise punished. For example, a recruit who has tried earnestly during rifle training and throughout record firing is not derelict in the performance of duties if the recruit fails to qualify with the weapon.[33]

Likewise, a violation of article 92(3) does not occur merely because an accused could have done more,[34] or took action to protect his own safety when circumstances also threatened his subordinates.[35]

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[20] MCM, 1984, Part IV, para. 16c(3)(c).

[21] *See id.*, Part IV, para. 16e analysis, app. 21, at A21-89; *see also supra* note 5.

[22] 7 C.M.R. 102 (A.B.R. 1952).

[23] The accused, a first lieutenant, was the athletic officer in a special service section. *Id.* at 103. He had instructions to ensure personally that a military basketball team traveled from one location to another, and he received money to cover the cost of the travel. *Id.* at 103-04. Rather than personally arranging for all the transportation, however, the accused gave some of the money to a private during the return trip and told him "to see the fellows got home." *Id.* at 104. The accused explained that he did not return home with the team or make the travel arrangements because "he was enjoying himself too much." *Id.*

[24] *Id.* at 106.

[25] MCM, 1984, Part IV, para. 16c(3)(c); *see* United States v. Kelchner, 36 C.M.R. 183, 185 (C.M.A. 1966); United States v. Ferguson, 12 C.M.R. 570, 576 (A.B.R. 1953).

[26] United States v. Grow, 11 C.M.R. 77, 86-87 (C.M.A. 1953).

[27] United States v. Sievert, 29 C.M.R. 657, 661-62 (N.B.R. 1959).

[28] MCM, 1984, Part IV, para. 16c(3)(c).

[29] 20 M.J. 225 (C.M.A. 1985).

[30] *Id.*

[31] Although the court did not expressly use the term "culpable inefficiency," this is the standard for the dereliction that the court's holding and the evidence suggest.

[32] *Nickels*, 20 M.J. at 225-26.

[33] MCM, 1984, Part IV, para. 16c(3)(d).

[34] *See Ferguson*, 12 C.M.R. at 574-75.

[35] *See* United States v. Flaherty, 12 C.M.R. 466, 470-71 (A.B.R. 1953).

The Dellarosa *Case*

The accused's position in *Dellarosa* required him to perform certain duties at the Base Weather Station at Fort Drum, New York.[36] At issue was the requirement that he periodically take, and accurately record, pressure and altimeter readings pertaining to weather conditions.[37] The specification alleged the accused to have been derelict in the performance of these duties, in that he "willfully failed to accurately record and report weather conditions as it was his duty to do."[38] Although the accused contested the charge, the court nonetheless convicted him of the "lesser included offense"[39] of being negligently derelict in the performance of his duties as alleged.[40]

The Court of Military Appeals in *Dellarosa* first observed that article 92(3) encompasses derelictions based upon faulty performance as well as nonperformance.[41] The court noted that because the military regularly has used "negligence terminology" over the years in faulty performance cases, any previous distinction in the language associated with the different theories of dereliction is no longer significant.[42]

The court next reiterated that a court must use an objective standard to assess the alleged negligence of the accused in a dereliction case.[43] The court noted that this standard comports with earlier military decisional law[44] and the 1984 Manual.[45]

The court in *Dellarosa* then addressed the sufficiency of the evidence to establish that the accused was objectively derelict in his duties because of faulty performance. The court noted initially that "no direct testimony was presented asserting that [the accused's] mistakes were unreasonable under the circumstances of this case."[46] The evidence nevertheless was sufficient to support the accused's conviction. In this regard, the court relied upon the testimony of the accused's commander who had served ten years as a weather observer.[47] The commander testified regarding the certainty, quantity, and severity of the accused's mistakes. Also important to the court was evidence pertaining to the accused's training and qualifications as a weather observer.[48] The court concluded that this evidence, taken together, was sufficient to establish dereliction through culpable inefficiency, even though the evidence was circumstantial in nature.[49]

The court finally considered the legal import of the defense evidence. The court wrote that the accused's purported inexperience and fatigue, although relevant to the issue of his culpability, did not preclude a finding of guilty in this case.[50] Of course, at some point an accused's lack of experience and training may move a case across the line that separates culpable inefficiency from mere ineptitude; the former will support a conviction under article 92(3) while the latter will not. In any event, this type of extenuating evidence presumably will be relevant on sentencing even if it is insufficient to negate guilt.[51]

Conclusion

As the *Dellarosa* case demonstrates, the uniquely military offense of dereliction of duty has many complex and subtle nuances. Counsel faced with prosecuting or defending a case involving this charge should become familiar with the guidance provided by *Dellarosa*, as well as the guidance found in other cases and Manual provisions that address this crime. Major Milhizer.

Defining Military Property

The Air Force and Army Courts of Military Review recently split on the tests they decided to use for determining whether Nonappropriated Fund Instrumentality

[36] *Dellarosa*, 30 M.J. at 256 n.2.

[37] *Id.* at 256-59.

[38] *Id.* at 256 n.2.

[39] Interestingly, the Court of Military Appeals referred to negligent dereliction of duties as being a lesser included offense of willful dereliction of duties. *Id.* at 256.

[40] *Id.* at 256 n.3. The court-martial tried the accused by military judge alone. The judge did not explain his reasoning in reaching his finding of guilty for negligent dereliction of duties, and the defense did not request an explanation. *Id.* at 256.

[41] *Id.* at 259.

[42] *Id.* (citing J. Snedeker, Military Justice Under the Uniform Code § 2905i (1953), and *Kelchner*, 36 C.M.R. 183 (C.M.A. 1966)).

[43] *Id.*

[44] *Kelchner*, 36 C.M.R. at 185; *Ferguson*, 12 C.M.R. at 576.

[45] MCM, 1984, Part IV, para. 16c(3)(c).

[46] *Dellarosa*, 30 M.J. at 259.

[47] *Id.* at 256, 260.

[48] *Id.* at 260 (citing *Grow*, 11 C.M.R. at 87).

[49] *Id.*; *cf.* MCM, 1984, Part IV, para. 16c(3)(b) (circumstantial evidence can establish the requisite knowledge for dereliction of duty).

[50] *Dellarosa*, 30 M.J. at 260.

[51] *See* MCM, 1984, Rule for Courts-Martial 1001c(1); *e.g. Nichels*, 20 M.J. at 226 (accused's repayment of funds constituted evidence in mitigation of a dereliction of duty offense).

(NAFI) assets and similar types of property are "military" property. These cases are significant because the status of property as either military or "nonmilitary" is important both in assessing whether a service member is criminally responsible for damaging or destroying the property,[52] and for determining the maximum punishment he faces for certain property offenses.[53]

In *United States v. Ford*[54] a majority of the Air Force court, sitting en banc, concluded that billeting funds collected from guests staying in billeting facilities were not military property. The majority seemed to apply a bright-line test: property is not military if it does not derive its existence from funds appropriated by Congress and if a NAFI holds the property for its exclusive use.[55] Under this test, the funds at issue in *Ford* were not military property.

The dissent in *Ford* favored a case-by-case approach.[56] Rather than categorically concluding that all NAFI property is per se "nonmilitary," the case-by-case approach would analyze the property at issue to see if it is uniquely military in nature or function.[57] The dissent concluded that the billeting funds at issue in *Ford* satisfied this definition of military property because the NAFI used the funds to maintain and upgrade transient quarters for students and personnel on temporary duty. The funds, therefore, "perform[ed] a *function* directly related to military mission accomplishment."[58]

The Army court, in *United States v. Thompson*,[59] used the same case-by-case approach as the dissent in *Ford* in deciding whether peanuts and coffee, taken from an Army commissary storage facility, were military property. Although the court concluded that the particular items at issue in *Thompson* were not uniquely military in nature and function—and thus not military property—the court observed in dicta that it could "envision a situation where property destined for resale by an Army commissary could be considered 'military property'...."[60]

Authorities can trace the disagreement between the courts of review directly to the ambiguous guidance given several years earlier by the Court of Military Appeals. In its opinion in the 1983 case of *United States v. Schelin*[61]—the most recent decision by that court to address the meaning of military property—the Court of Military Appeals included language that supports both approaches. Indeed, appellate judges from the various courts of review have quoted portions of the following discussion in support of contrary positions:

> We agree with the majority of the court below that retail merchandise of the Army and Air Force Exchange Service was not "military property of the United States." ... In the absence of any Congressional guidance, it seems most likely to us that "military property" was selected for special protection due to its role in the national defense. In other words, it is either the uniquely military nature of the property itself, or the function to which it is put, that determines whether it is "military property" within the meaning of Article 108. We do not suggest that it is only tanks, cannons, or bombers

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[52] *See* UCMJ art. 108. Article 108 proscribes certain offenses against military property of the United States. Prohibited conduct includes the sale, loss, damage, destruction, and wrongful disposition of the property. *Id.*; MCM, 1984, Part IV, para. 32b. The accused's misconduct can be willful or negligent. An article 108 violation also can occur if the accused suffers the loss, damage, destruction, sale, or wrongful disposition of military property. The *mens rea* required for damaging or destroying personal, nonmilitary property, as proscribed by UCMJ article 109, is more limited. *See* MCM, 1984, Part IV, para. 33b(2)(a). Mere negligence or recklessness does not satisfy the specific intent requirement for this offense. *See id.*, Part IV, para. 33c(2); *see, e.g.*, United States v. Bernacki, 33 C.M.R. 175 (C.M.A. 1963) (the accused, who recklessly damaged a civilian car while fleeing apprehension, lacked the requisite *mens rea* for an article 109 offense); United States v. Priest, 7 M.J. 791 (N.C.M.R. 1979) (the accused, who recklessly damaged a privately owned boat by operating it in shallow water, lacked the requisite *mens rea* for an article 109 offense). The accused's misconduct must be willful—which the Manual defines as intentional— to constitute a violation of article 109. MCM, 1984, Part IV, para. 33c(2); *see* United States v. Valadez, 10 M.J. 529 (A.C.M.R. 1980); United States v. Yoakum, 8 M.J. 763 (A.C.M.R. 1980); United States v. Jones, 50 C.M.R. 724 (A.C.M.R. 1975). For a more detailed comparison of articles 108 and 109, see Note, *Damaging Property and Mens Rea*, The Army Lawyer, Feb. 1990, at 66.

[53] Larceny of military property of a value of more than $100 is punishable by a dishonorable discharge, total forfeitures, and ten years' confinement, whereas larceny of nonmilitary property of the same value is punishable by a dishonorable discharge, total forfeitures, and five year's confinement. MCM, 1984, Part IV, para. 46e(1)(c), (d).

[54] 30 M.J. 871 (A.F.C.M.R. 1990) (en banc).

[55] *Id.* at 872-74. The concurring opinions in *Ford* would have held that money never can be military property, even though government authorities and service members can use it to purchase military property. *Id.* at 875-76 (Hodson, C.J. & Pratt, J., concurring in the result).

[56] *Id.* at 876 (Blommers, J., dissenting).

[57] *Id.* at 877.

[58] *Id.* at 878 (emphasis in original).

[59] 30 M.J. 905 (A.C.M.R. 1990).

[60] *Id.* at 906.

[61] 15 M.J. 218 (C.M.A. 1983).

that merit the protection of Article 108, for many items of ordinary derivation are daily put to military use. However, retail merchandise of the Army and Air Force Exchange Service does not seem to fit into the specially-protected category.[62]

Military legal practitioners should hope that the Court of Military Appeals will provide clear guidance soon regarding the appropriate analysis for determining whether property is military for purposes of UCMJ sanctions. Until then, trial practitioners, like the appellate judges in *Ford* and *Thompson*, must interpret the confusing language of *Schelin* and other cases. Major Milhizer.

Courts Strictly Construed Waiver for the Statute of Limitations Defense

Most criminal defenses fall within one of the following four categories: failure of proof defenses,[63] offense modification defenses,[64] justification defenses,[65] and excuse defenses.[66] These defenses generally seem well grounded, because an actor entitled to their operation has either not committed an offense, not caused the harm that the statute seeks to prevent, or not engaged in behavior that either is justified or excused.

A fifth major category of defenses, although analytically sound, is less emotionally appealing. Authorities often refer to these defenses as "nonexculpatory defenses." These defenses differ from all other types of defenses in that they allow an actor to avoid a conviction even though he "by all measures deserves condemnation and punishment."[67] The law allows nonexculpatory defenses to facilitate and protect important social interests that society judges to be more weighty than the conviction of an actor who undeniably has engaged in criminal misconduct. Examples of nonexculpatory defenses include "diplomatic immunity, judicial, legislative, and executive immunities, immunity after compelled testimony or pursuant to a plea bargain or other agreement, and incompetency to stand trial."[68]

The "objective" or "due process" entrapment defense is another example of a nonexculpatory defense.[69] Commentators,[70] the Model Penal Code,[71] and a minority of states[72] and Supreme Court justices[73] favor the objective theory of entrapment. Under that theory, the focus is on the inducements offered by government agents.[74] The law intends the defense to serve the important public policy goal of protecting the integrity of the judicial process by ensuring that improper or offensive

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[62] *Id.* at 220 (footnotes omitted).

[63] "Failure of proof defenses consist of instances in which, because of the conditions that are the basis for the 'defense,' all elements of the offense charged cannot be proven. They are in essence no more than a negation of an element required by the definition of the offense." 1 P. Robinson, Criminal Law Defenses 72 (1984). Examples of this type of defense depend largely upon the elements of proof of the offenses as set forth under the system or code involved. Alibi and good character are classic examples of failure of proof defenses. *See* R.C.M. 916(a) discussion.

[64] Offense modification defenses apply when the evidence satisfies all elements of the offense. The law, nonetheless, does not consider the conduct criminal because the actor has not caused the harm or evil that the statute that defines the offense seeks to prevent. 1 Robinson, *supra* note 63, at 77. As with failure of proof defenses, the application of offense modification defenses is primarily dependent upon the offense as defined by statute.

[65] Justification defenses apply when the harm caused by the nominally illegal conduct is "outweighed by the need to avoid an even greater harm or to further a greater societal interest." 1 Robinson, *supra* note 63, at 83. Examples of justification defenses include necessity, self-defense, defense of another, and defense of property. 2 *id.* at 124, 131-34. *See generally* Milhizer, *Necessity and the Military Justice System: A Proposed Special Defense*, 121 Mil. L. Rev. 95 (1988).

[66] Excuse defenses apply when the conduct is illegal but nonetheless the law excuses the actor because he or she is not responsible for the conduct. 1 Robinson, *supra* note 63, at 91. Examples of excuse defenses include divestiture, insanity, and duress. 2 *id.* at 173 & 177. Milhizer, *United States v. Collier and the Divestiture Defense*, The Army Lawyer, Mar. 1990, at 3, 10-11.

[67] 2 Robinson, *supra* note 63, at 460.

[68] 1 *id.* at 103 (footnotes omitted).

[69] *See generally* United States v. Vanzandt, 14 M.J. 332, 343 n.11 (C.M.A. 1982).

[70] *E.g.*, 2 Robinson, *supra* note 63, at 209(d); Carlson, *The Act Requirement and the Foundations of the Entrapment Defense*, 73 Va. L. Rev. 1011 (1987).

[71] Model Penal Code § 2.13 (1982).

[72] *See, e.g.*, People v. Burraza, 23 Cal.3d 675, 153 Cal. Rptr. 459, 591 P.2d 947 (1979); People v. Turner, 390 Mich. 7, 210 N.W.2d 336 (1973). Both cases overruled earlier decisions supporting the subjective theory of entrapment. *See also* Grossman v. State, 457 P.2d 226 (Alaska 1969); 2 Robinson, *supra* note 63, at 514 n.13; 1 W. LaFave & A. Scott, Substantive Criminal Law 601 nn. 33 & 34 (1986).

[73] *E.g.*, Sorrells v. United States, 287 U.S. 435, 458 (1932) (Roberts, J., concurring); Sherman v. United States, 356 U.S. 369, 380 (1958) (Frankfurter, J., concurring); United States v. Hampton, 425 U.S. 484, 495 (1973) (Brennan, J., dissenting).

[74] 1 LaFave & Scott, *supra* note 72, at 601.

conduct by government officials does not contaminate it.[75] Thus, even if an actor is predisposed to commit an offense and is otherwise culpable, the objective entrapment defense will operate to avoid his conviction.[76]

Perhaps the most frequently encountered nonexculpatory defense is the statute of limitations defense.[77] The defense serves several important public policy goals,[78] the foremost being "the desirability of requiring that prosecutions be based upon reasonably fresh evidence."[79] As with other nonexculpatory defenses, the accused's entitlement to the statute of limitations defense is not related to whether he is otherwise criminally culpable for his misconduct.[80]

The military statute of limitations appears at UCMJ article 43.[81] Section (a) of article 43 lists those offenses for which the statute of limitations does not apply.[82] Section (b) provides generally for a five-year statute of limitations for most offenses at a trial by court-martial, and a two-year statute of limitations for nonjudicial punishment.[83] Sections (c) and (d) provide for tolling[84] the statute in situations in which the accused is absent without authority, is fleeing from justice, or is otherwise beyond the jurisdiction of the United States.[85] Sections (e) and (f) address how the statute of limitations will apply differently in wartime.[86] Finally, section (g) explains how

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[75] *Sorrells*, 287 U.S. at 458 (Roberts, J., concurring).

[76] For discussions of the entrapment defense under military law generally, see Note, *Multiple Requests, Profit Motive, and Entrapment*, The Army Lawyer, Jun. 1990, at 48; and Note, *The Evolving Entrapment Defense*, The Army Lawyer, Jan. 1989, at 40.

[77] *See generally* 2 Robinson, *supra* note 63, at 202.

[78] *See* 1 *id.* at 102.

[79] Model Penal Code § 1.06, Comment 17 (Tent. Draft No. 5, 1956), *quoted in* 1 Robinson, *supra* note 63, at 102. The Comment to the Model Penal Code explains that "with the passage of time memory becomes less reliable, witnesses may die or become otherwise unavailable; physical evidence becomes more difficult to obtain, more difficult to identify and more likely to be contaminated." *Id.*

[80] Of course, the statutory period may vary depending upon the severity of the offense, and typically does not apply to capital offenses. 2 Robinson, *supra* note 63, at 463.

[81] UCMJ art. 43. For an examination of how the recent amendments to article 43 have changed the military statute of limitations, see United States v. Jones, 26 M.J. 1009 (A.C.M.R. 1988), *discussed in* Note, *Is Absence Without Leave a Continuing Offense?*, The Army Lawyer, Nov. 1988, at 38.

[82] UCMJ article 43(a) provides: "A person charged with absence without leave or missing movement in time of war, or with any offense punishable by death, may be tried and punished at any time without limitation."

[83] UCMJ article 43(b) provides:

> (1) Except as otherwise provided in this section (article), a person charged with an offense is not liable to be tried by court-martial if the offense was committed more than five years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command.
>
> (2) A person charged with an offense is not liable to be punished under section 815 of this title (article 15) if the offense was committed more than two years before the imposition of punishment.

[84] "To toll the statute of limitations means to show facts which remove its bar to action." H. Black, Black's Law Dictionary 1658 (Rev. 4th ed. 1968).

[85] UCMJ article 43(c) & (d) provide, respectively:

> (c) Periods in which the accused is absent without authority or fleeing from justice shall be excluded in computing the period of limitation prescribed in this section (article).
>
> (d) Periods in which the accused was absent from territory in which the United States has the authority to apprehend him, or in the custody of civil authorities, or in the hands of the enemy, shall be excluded in computing the period of limitation prescribed in this article.

[86] UCMJ article 43(e) & (f) provide, respectively:

> (e) For an offense the trial of which in time of war is certified to the President by the Secretary concerned to be detrimental to the prosecution of the war or inimical to the national security, the period of limitation prescribed in this article is extended to six months after the termination of hostilities as proclaimed by the President or by a joint resolution of Congress.
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> (f) When the United States is at war, the running of any statute of limitations applicable to any offense under this chapter—
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> > (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not;
> >
> > (2) committed in connection with the acquisition, care, handling, custody, control, or dispositon [sic] of any real or personal property of the United States; or
> >
> > (3) committed in connection with the negotiation, procurement, award, performance, payment, interim financing, cancellation, or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the war, or with any disposition of termination inventory by any war contractor or Government agency;
>
> is suspended until three years after the termination of hostilities as proclaimed by the President or by a joint resolution of Congress.

the statute of limitations will operate with respect to charges and specifications that a convening authority has dismissed.[87]

Several recent court of review cases have addressed article 43 in some detail. In virtually all of these cases, the appellate courts have construed the statute of limitations defense quite favorably for the accused, especially with respect to whether the accused has waived the defense effectively. In *United States v. Lee*,[88] for example, the Army Court of Military Review held that the accused's guilty pleas alone were not sufficient to constitute a waiver of the statute of limitations.[89] In *United States v. Brown*[90] the Army court held that the defense counsel's erroneous conclusion that the statute of limitations had been tolled did not constitute waiver of the defense in a guilty plea case.[91] The Navy-Marine court, in *United States v. Moore*,[92] held that the accused did not waive the statute of limitations as to some specifications merely because he asserted the defense as to others.[93] Finally, in both *Moore* and *United States v. Souza*,[94] the Navy-Marine court held that the accused's guilty pleas to offenses that might fall outside of the statute of limitations were improvident because the accused did not waive the defense effectively.[95]

All of these cases instruct that the military judge must ascertain the accused's waiver of the statute of limitations in open court. As the Court of Military Appeals wrote over thirty years ago in *United States v. Rodgers*:[96]

> It is well established in military jurisprudence that whenever it appears the statute of limitations has run against an offense, the court "will bring the matter to the attention of the accused and advise him of his right to assert the statute unless it otherwise affirmatively appears that the accused is aware of his rights in the premises."[97]

The Court of Military Appeals recently reiterated this requirement[98] and the requirement appears expressly in the 1984 Manual.[99]

Despite the categorical requirement for an affirmative waiver of the statute of limitations defense in open court, a surprising number of cases continue to reach the appellate courts in which the trial participants either neglected to recognize the potential application of article 43, or failed to address effectively the impact of the defense at the trial. Given the strictness of the waiver requirements under military law, counsel must ensure that they litigate all potential statute of limitation issues on the record. Major Milhizer.

Legal Assistance Items

Faculty members of the Administrative and Civil Law Division, The Judge Advocate General's School, have prepared the following notes to advise legal assistance attorneys of current developments in the law and in legal assistance program policies. Counsel also can adapt these notes for use as locally-published preventive law articles

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[87] UCMJ art. 43(g) provides:

> (1) If charges or specifications are dismissed as defective or insufficient for any cause and the period prescribed by the applicable statute of limitations—
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> (A) has expired; or
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> (B) will expire within 180 days after the date of dismissal of the charges and specifications,
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> trial and punishment under new charges and specifications are not barred by the statute of limitations if the conditions specified in paragraph (2) are met.
>
> (2) The conditions referred to in paragraph (1) are that the new charges and specifications must—
>
> (A) be received by an officer exercising summary court-martial jurisdiction over the command within 180 days after dismissal of the charges or specifications; and
>
> (B) allege the same acts or omissions that were alleged in the dismissed charges or specifications (or allege acts or omissions that were included in the dismissed charges or specifications).

[88] 29 M.J. 516 (A.C.M.R. 1989).

[89] *Id.* at 517-18. The court concluded that it nonetheless could convict the accused of offenses that the evidence presented by the government independently established on the merits. *Id.* at 518.

[90] 30 M.J. 907 (A.C.M.R. 1990).

[91] *Id.* at 909.

[92] 30 M.J. 962 (N.M.C.M.R. 1990).

[93] *Id.* at 965.

[94] 30 M.J. 715 (N.M.C.M.R. 1990).

[95] *Moore*, 30 M.J. at 965-67; *Souza*, 30 M.J. at 717. *But cf.* United States v. Colley, 29 M.J. 519, 522-23 (A.C.M.R. 1989) (expiration of statute of limitations with respect to the first day of period of alleged crimes did not require reversal under circumstances, but only required that court correct specifications to reflect convictions for crimes beginning one day later).

[96] 24 C.M.R. 36 (C.M.A. 1957).

[97] *Id.* at 38 (quoting Manual for Courts-Martial, United States, 1951, para. 68c).

[98] United States v. Salter, 20 M.J. 116, 117 (C.M.A. 1985).

[99] R.C.M. 907(b)(2)(B) instructs that the accused may waive the statute of limitations defense, "provided that, if it appears that the accused is unaware of the right to assert the statute of limitations in bar of trial, the military judge shall inform the accused of this right."

to alert soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer*; authors should send submissions to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781.

Soldiers' and Sailors' Civil Relief Act Note

Soldiers' and Sailors' Civil Relief Act Protection for Active and Reserve Component Soldiers

Operation Desert Shield has raised numerous issues and challenges for legal assistance attorneys. Because the deployment exceeds the size and scope of any deployment since the Vietnam War, judge advocates are confronting questions that they have not faced in almost twenty years. In particular, President Bush's activation of thousands of Army, Air Force, Navy, and Marine Corps reservists brings into focus several rarely invoked provisions of the Soldiers' and Sailors' Civil Relief Act[100] (SSCRA). This note will discuss the applicability of the SSCRA to situations arising from deployments such as Desert Shield, in which the military deploys on short notice tens of thousands of active and reserve component service members to overseas locations. Although attorneys should attempt to negotiate the best arrangements for their clients in transactions covered by SSCRA, practitioners should be careful not to affect their clients' SSCRA protections by entering into supplementary, post-entry commitments.

Reserve Component Eligibility for SSCRA Coverage

A reserve component soldier and his or her family members are authorized legal assistance from active Army legal assistance attorneys when the reserve component soldier is on active duty for thirty days or more.[101] Additionally, if reserve component judge advocates are not available, reserve component soldiers may receive predeployment assistance such as wills and powers of attorney from active duty judge advocates, even when the reserve component soldiers will not be on active duty for thirty days.[102] Consequently, active duty judge advocates must be as well versed as their reserve component colleagues on how the SSCRA protects reserve component soldiers.[103]

As a general rule, the SSCRA applies to "persons in military service." Under the SSCRA, "persons in the military service" means members of the Army of the United States, the Air Force, the United States Navy, the Marine Corps, the Coast Guard, and officers of the Public Health Service detailed for duty with the Army or the Navy.[104]

Although the SSCRA does not define who members of these services are, other federal statutes in title 10, United States Code, give helpful definitions.[105] The SSCRA defines "military service" as "Federal service on active duty with any branch of service" indicated above.[106] Therefore, reserve component soldiers called to duty during the current deployment should receive the protections afforded by the SSCRA. Actual implementation of the SSCRA demonstrates more clearly how Congress intended the act to protect reservists. Many provisions of the SSCRA, such as those protecting against mortgage foreclosure, limiting maximum interest rates, and allowing termination of leases, require that servicemembers have obligations which predate their active service. Accordingly, many of the protections provided by the SSCRA ordinarily are unavailable to the career soldier. The following discussion helps clarify this point.

Termination of Leases

If a soldier entered a lease prior to entering on active duty or receiving orders to active duty, the SSCRA provides a means by which the soldier may lawfully terminate the lease.[107] Unlike many other provisions of the act, to invoke this protection, the soldier need not show

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[100] 50 U.S.C. App. §§ 501-548, 560-591 (1988).

[101] Policy Letter 88-1, Office of The Judge Advocate General, U.S. Army, subject: Reserve Component Premobilization Legal Preparation, 4 Apr. 1988, *reprinted in* The Army Lawyer, May 1988, at 3.

[102] *Id.*

[103] For a discussion of SSCRA eligibility, see Administrative and Civil Law Division, The Judge Advocate General's School, U.S. Army, Publication JA 260, Legal Assistance Guide: The Soldiers' and Sailors' Civil Relief Act, chap. 2 (Sep. 1990).

[104] 50 U.S.C. App. § 511(1) (1988).

[105] The Army of the United States includes the Regular Army, the Army National Guard of the United States, the Army National Guard while in service of the United States, the Army Reserve, and all persons appointed, enlisted, or conscripted without component. 10 U.S.C. § 3062(c) (1988). Similarly, the Air Force includes the Regular Air Force, the Air National Guard of the United States, the Air National Guard while in the service of the United States, the Air Force Reserve, Air Force personnel without component, and all other units and individuals who form the basis for complete mobilization for national defense in the event of a national emergency. 10 U.S.C. § 8062(d) (1988). The United States Navy includes the Regular Navy, the Fleet Reserve, and the Naval Reserve. 10 U.S.C. § 5001(a)(1) (1988). The Marine Corps includes the Regular Marine Corps, the Fleet Marine Corps Reserve, and the Marine Corps Reserve. 10 U.S.C. § 5001(a)(2) (1988). Members of the Coast Guard include the Regular Coast Guard and the Coast Guard Reserve. 14 U.S.C. §§ 211-13, 351, 751a, 762 (1988). Coast Guard status obtains whether the branch actually operates with the Navy or with the Department of Transportation. 14 U.S.C. § 1 (1988).

[106] 50 U.S.C. App. § 511(1) (1988).

[107] 50 U.S.C. § 534 (1988).

that military service is materially affecting the soldier's ability to meet obligations under the lease—particularly the obligation to pay rent. Instead, the soldier need only show that 1) he entered into the lease prior to beginning military service, which the SSCRA defines as *active* service; 2) the lease was for dwelling, professional, business, agricultural, or similar purposes of the soldier or the soldier's dependents; and 3) the soldier is currently in military service.

Unfortunately, many soldiers and commanders alike misconstrue this provision of the SSCRA. They understand it to allow soldiers who entered leases *after* entry onto active duty to terminate the lease, particularly during an emergency deployment such as Desert Shield. The SSCRA provides no such protection. Several states have statutes that allow termination of leases under these circumstances, but these state laws are rare and do not represent the majority of the states. The many problems created in misconstruing this part of the SSCRA highlight the need for legal assistance offices to have an active preventive law program. This program should emphasize review of leases and inclusion of provisions that provide for termination upon emergency deployment, permanent change of station, extended temporary duty, and similar military exigencies.

Eviction from Leased Housing

The SSCRA does provide protection from eviction for soldiers and family members regardless of whether they entered a lease before or after entry upon active duty.[108] If 1) the soldier or the soldier's dependents are occupying premises; 2) the soldier's military service materially is affecting his or her ability to make rental payments; and 3) the rent does not exceed $150 per month, the SSCRA provides for a stay of eviction for up to three months following discharge.

Obviously, the $150 cap on rent makes invoking the protections of this provision extremely difficult. Congress established the $150 threshold in 1966, when it amended the SSCRA and raised the rental ceiling from $80. At least one court has been receptive to a petitioner's request for an adjustment for inflation in considering the amount of the petitioner's rent. In *Balconi v. Dvascas*[109] the monthly rent was $340. The court concluded, however, that the rent was actually less than $150 in 1966 dollars, after adjustment for inflation occurring since 1966. Accordingly, the court stayed an eviction proceeding. Attorneys should be prepared to make similar arguments on behalf of clients until Congress acts to correct this discrepancy in the SSCRA.

Limitation of Interest Rates to Six Percent

One of the most controversial provisions of SSCRA is the maximum rate of interest provision.[110] This provision places a six-percent cap on the interest that a creditor may charge a soldier for credit extended to the soldier *before* the soldier's entry on active duty. During a typical peacetime scenario, soldiers rarely invoke this provision. The primary reason for its infrequent use is the SSCRA's requirement that 1) the soldier's military service must affect materially the ability to pay the obligation and 2) the obligation must predate the soldier's active service. Most officers and enlisted soldiers entering the military from civilian life actually experience an enhanced ability to meet any preservice financial obligations.

The Desert Shield reserve component call-up has drastically changed this scenario. Many of these soldiers will experience financial difficulties because their military pay and benefits will not match their civilian pay. Nearly all of the affected financial commitments will be preservice. Although reservists may have made such commitments while they were members of the reserve components, they nevertheless entered into these obligations before entry on active duty.

Most creditors likely will assert that they will abide by the SSCRA and limit interest rates to six percent for those soldiers meeting the criteria set out above. In fact, this provision of the SSCRA puts the burden on the creditor to demonstrate that a soldier's military service is *not* affecting the ability to repay a loan. Attorneys should take the initiative and advise clients' creditors if their clients cannot meet financial obligations. This is a far better course than allowing a client to go into default, and then invoking the SSCRA after the fact as a defense.

Perhaps the most intractable problem with the SSCRA pertains to interest above six percent. What happens when a loan agreement provides that the debtor will pay interest at an annual rate of fourteen percent? Is this difference—eight percent—forgiven or accrued? Most creditors likely will accrue it. For example, some bank servicing rules may allow a six-percent cap during active service but consider the excess to be a delinquency that the debtor must pay within three months of leaving the service.[111]

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[108] *Id.* § 530 (1988).

[109] 133 Misc. 2d 686, 507 N.Y.S.2d 788 (Rochester City Ct. 1986).

[110] 50 U.S.C. App. § 526 (1988).

[111] *Contra* S. Rep. No. 1558, 77th Cong., 2d Sess. 4 (1942).

Accruing interest appears to be contrary to the legislative intent that Congress espoused when it enacted this provision as an amendment to the SSCRA in 1942. Referring to the original law, enacted in 1940, a Senate report noted that the law did not "prevent an accumulation of excess interest" and allowed only for a stay of proceedings in the event a creditor initiated a collection action.[112] The amendment, however, prohibited "interest at a rate in excess of 6 percent."[113] During debate in the House of Representatives, Congressman Kilday, a member of the House Committee on Military Affairs, explained this provision. He stated that "while a man is in service the interest on his contract shall not exceed 6 percent per annum."[114] He pointed out that a number of banking industry representatives had appeared before his committee and had not objected to the provision.[115]

While Congress enacted the interest limitation at a time when prevailing interest rates were very low, the provision remains the law. Although attorneys should be judicious in invoking the benefits of this provision, they should assert it when appropriate. Furthermore, congressional intent indicates that creditors may not charge interest above six percent during the soldier's term of active service; accordingly, interest above six percent cannot accrue. Legal assistance attorneys should put lenders on notice of this issue and attempt to ensure the best possible terms for their clients. Like the $150 trigger for eviction protection, the six-percent interest limit is ripe for congressional action.

Conclusion

The Desert Shield deployment provides a real-world lesson on the purpose and applicability of the SSCRA. While many of its provisions are inapplicable to peacetime active duty soldiers, these same provisions can provide much-needed relief for reserve component soldiers who receive orders to leave their civilian occupations and salaries for active duty. Timely and informed use of the provisions of the SSCRA will help ensure that active and reserve component soldiers who serve their country will not encounter unnecessary financial or legal impairment as a result of that service. MAJ Pottorff.

Tax Note

Trial Court Order Addressing Tax on Military Retired Pay Reversed

Military finance centers withhold federal income taxes on the entire amount of retired pay regardless of any distributions to a former spouse. Accordingly, divorce courts often attempt to adjust federal income tax liability in orders requiring payment of retired pay to a former spouse. A Washington Court of Appeals interpretation of federal law, however, will limit trial courts' discretion to fashion an order addressing the tax consequences of divisions of military retired pay.

In *In re Marriage of Haugh*[116] the trial court awarded the wife of a military retiree a percentage of the retiree's gross retirement pay. The trial court, recognizing that the military withholds income taxes on the entire amount of retirement pay regardless of distributions to a former spouse, ordered the wife to pay an annual lump sum representing the federal income tax liability on the amount of retirement pay awarded to her. In exchange, the court ordered the husband to hold the wife harmless on any income tax liability and to refrain from altering reductions from his retirement pay.

The Washington Court of Appeals reversed the order, finding that it conflicted with federal law. The appellate court reasoned that the allocation of future tax liability is "a matter fully within the federal sphere, and preempted by the Internal Revenue Code."[117]

The court also disapproved the part of the trial court order restricting the husband from altering the deductions from his military retired pay. While the court was sympathetic to the trial court's concern that the husband unilaterally could reduce the amount paid to the wife, the lower court's order was improper because it prohibited the husband from changing his federal income tax withholding. The appellate court observed that the husband might, under some circumstances, need to make changes pursuant to the Internal Revenue Code and noted that federal income tax withholding is one of the authorized deductions under the statute. Accordingly, the court ruled that federal law preempted this portion of the order.

The appellate court suggested that upon remand the trial court could consider the husband's receipt of the difference between his disposable pay and his gross pay as a factor in deciding an equitable distribution. The court could take into account the receipt of the difference under Washington law, which permits consideration of the spouse's economic circumstances as a factor in determining support payments. The court warned, however, that the Uniformed Services Former Spouse Protection Act[118]

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[112] *Id.*

[113] *Id.*

[114] 77 Cong. Rec. 5366 (1942).

[115] *Id.*

[116] 790 P.2d 1266 (Wash. App. 1990).

[117] *Id.* at 1271. The court found that this arrangement conflicted with I.R.C. § 402(a)(9). *See id.*

[118] 10 U.S.C. § 1408(a) (1985).

limits the amount that a military service may pay directly to a former spouse to fifty percent of disposable retired pay. Thus, although the trial court could order an increase in the wife's share of retired pay, it could not order the military service to pay more than fifty percent of that pay directly to her. MAJ Ingold.

Estate Planning Notes

Durable Powers of Attorney for Health Care

Estate planners traditionally have ignored the many problems caused by a client's becoming disabled, even though disability usually is more proximate than death.[119] A document that estate planners should consider to help clients cope with the problems associated with disability is the durable power of attorney. Because a durable power of attorney comes into effect and remains in effect despite the disability of the principal, it is a very useful document for appointing an agent to make health care decisions.

Although all states and the District of Columbia have statutes authorizing durable powers of attorney, not every jurisdiction specifically recognizes that named attorneys-in-fact, or agents, can use these powers for health-care decision making. As of August 1990, the laws in only eleven states and the District of Columbia specifically allow agents to use durable powers of attorney for health care decisions, including the decision to withdraw or withhold life-sustaining medical treatment.[120] Six other states—Alaska, Colorado, New Mexico, North Carolina, Pennsylvania, and Washington—have laws that permit health care decision making by an agent appointed under a durable power of attorney, but those laws do not mention whether that authority extends to withdrawal of life-sustaining treatment. The natural death or living wills statutes in eleven other states authorize proxy health care appointments but only when the principal has a terminal condition.[121] Finally, case law and attorney-general decisions in several other states suggest that an individual may appoint an agent for health care decision making even though no specific language authorizing such appointment appears in state statutes.[122]

Because this is a rapidly developing area of the law, a durable power of attorney will not necessarily be ineffective in the absence of specific statutory authority. Some states have specific statutory forms that attorneys should use for clients domiciled or receiving health care in those states. If the state provides no specific form, an attorney should consider using a form recently prepared by the American Bar Association Commission on Legal Problems of the Elderly. Attorneys should address a client's health care functions in an entirely separate power of attorney from those involving his or her personal and financial affairs.

The most critical component of any power of attorney for health care is the selection of the agent. If possible, the agent should be a family member and the client should name at least one alternate agent. Several states have statutory restrictions concerning who may serve as the attorney-in-fact. For instance, some state statutes will not allow health care providers to be the agent on health care powers of attorney.

Attorneys also should take great care in tailoring the power of attorney to the particular needs and desires of the client. In addition, practitioners should discuss with their clients the possibility of including a provision regarding withdrawal of life support treatment, including nutrition and hydration. When addressing this area, the drafter should be aware that some state statues specifically mention certain medical procedures, such as abortions or sterilization, that agents may not authorize using durable powers of attorney. The goal of any drafter in this area should be to provide clear and complete guidance to the agent and health care providers. If the principal also executed a living will, the attorney carefully must review and compare the two instruments to insure that no ambiguities exist.

In most jurisdictions, agents exercising their power under a durable power of attorney in good faith will not be subject to civil or criminal liability. Nevertheless, including language that specifically exculpates the agent for acts taken in accordance with the power of attorney is always a good idea. The power of attorney also should address when the agent's powers will terminate.

State laws vary considerably over the execution requirements for durable powers of attorney. As a general rule, at least two individuals must witness the execution and they should not be primary beneficiaries under the principal's will.

Although differences in states' laws exist, the trend in medical, legal, and political circles is toward acceptance

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[119] Insurance statistics indicate, for example, that a person 22 years old is 7.5 times more likely to sustain a period of disability of 90 days or more than he or she is to die. *See* Collin, Lombard, Moses & Spitler, The Durable Power of Attorney: A Systems Approach (2d ed. 1987).

[120] States specifically recognizing durable powers of attorney for health care are California, Georgia, Illinois, Kansas, Maine, Nevada, Ohio, Oregon, Rhode Island, Texas, and Vermont. Practitioners may obtain case law and statutory citations concerning durable powers of attorney for health by writing to the Society for the Right to Die or Concern for the Dying, 250 West 57th Street, New York, NY 10107.

[121] Arkansas, Delaware, Florida, Idaho, Indiana, Louisiana, Minnesota, Texas, Utah, Virginia, and Wyoming.

[122] Arizona, Colorado, Hawaii, Iowa, Maryland, New Jersey, and New York.

of durable powers of attorney for health care. The durable power of attorney can be an extremely effective document to communicate health care desires and to delegate decision making authority to a person or persons of choice when the principal is disabled. MAJ Ingold.

Using No-Contest Provisions in Wills

Clients often request their attorneys to insert a provision in their wills to reduce the likelihood of a will contest. These no-contest, or *in terrorem*, clauses revoke bequests if the beneficiary begins or participates in a will contest.[123]

Courts generally will uphold no-contest clauses. In several states, however, statutes alter the general rule. Georgia, for example, will not uphold an *in terrorem* clause unless the testator has made a gift over.[124] Some states will not enforce *in terrorem* clauses if reasonable grounds exist for bringing a will contest suit.[125] In these states, litigants will forfeit their bequest only if the will contest was without good cause.

The approaches taken by the courts toward such clauses differ. At least one court has expressed the view that public policy favors *in terrorem* clauses because they reduce the likelihood of specious will contests.[126] Most courts, however, disfavor no-contest clauses and avoid forfeiture if possible.[127]

Not every action brought by a beneficiary will trigger the forfeiture provision of a no-contest clause. Courts are quite unanimous in holding that objections to the appointment of a particular executor or personal representative will not trigger the clause.[128] Moreover, an action seeking a declaratory judgment that an executor had no standing to contest a family will settlement agreement does not constitute a will contest triggering an *in terrorem* clause.[129]

Courts also have held consistently that creditors' claims against an estate do not trigger no-contest clauses. In a recent case, the Utah Supreme Court held that the filing of a creditor's claim to an interest in a home that the testator devised in the will was not an attack on the will and therefore did not trigger a no-contest provision in the will.[130] Another recent case held that an adopted child's claim against an estate based on the testator's failure to comply with provisions of a separation agreement did not constitute an attack on a will.[131]

Testators often use *in terrorem* clauses to deter the testator's close relatives from contesting a will in which they receive a small bequest. Attorneys must be aware, however, of the limits on a testator's testamentary freedom to disinherit a relative such as a child or spouse. State law generally will entitle the testator's spouse to a statutory elective share if the testator leaves his or her spouse out of a will or gives the spouse only a token bequest. A testator may, however, omit children from a will by specifically mentioning the child in the will. If the testator does not mention a child in the will, pretermitted heirs statutes in most states presume that the testator made a mistake and allow the child to take his or her intestate share.

In terrorem clauses can serve a useful purpose in some estates and courts generally will uphold them unless used for disinheriting a spouse. Because courts strictly construe no-contest clauses, attorneys should draft them carefully. Attorneys always should include a gift over or specify what happens to the forfeited bequest in the event that a beneficiary brings a will contest. MAJ Ingold.

Professional Responsibility Note

Attorney Suspended - Improper Will Execution

The Iowa State [illegible]ociation handed an Iowa attorney a stiff pun[illegible] indefinite suspension from practicing law for [illegible] and backdating his disabled father's will.[132] The father of the attorney wished to change a will he had executed earlier to provide more

[123] One example of a no contest clause provides:

> If any beneficiary under this will in any manner directly or indirectly contests or attacks this will or any of its provisions, any share or interest in my estate given to that contesting beneficiary under this will is revoked and shall be disposed of in the manner provided herein as if that contesting beneficiary had predeceased me without issue.

[124] A "gift over" means that the testator: 1) has given a gift to a beneficiary for that beneficiary's life; and 2) has named another beneficiary to receive the gift at the end of the first benficiary's life. *See also* Black's Law Dictionary 620 (5th ed. 1979).

[125] Alaska, Hawaii, Idaho, Maryland, Michigan, Montana, Nebraska, New Jersey, and North Dakota. Shilling, Will Drafting 39 (1987).

[126] *In re* Estate of Westfahl, 675 P.2d 21 (Okla. 1983).

[127] *See, e.g.*, Linkous v. National Bank of Ga., 247 Ga. 274, 274 S.E.2d 469 (1981); Ivancovich v. Meier, 122 Ariz. 346, 596 P.2d 24 (1979); Estate of Alexander, 395 N.Y.S.2d 598, 90 Misc. 2d 482 (Surr. 1977).

[128] Estate of Newbill, 781 S.W.2d 727 (Tex. Ct. App. 1989); Wojtalewicz v. Waitel, 93 Ill. App. 3d 1061, 418 N.E.2d 418 (1981).

[129] Estate of Hodges, 725 S.W.2d 265 (Tex. App. 1986).

[130] Doelle v. Bradley, 784 P.2d 1176 (Utah 1989).

[131] *In re* Freidman, 549 N.Y.S.2d 353 (Surr. Ct. 1989). The testator agreed in the separation agreement to leave his daughter not less than her intestate share and to carry insurance on his life, payable to her. The testator failed to comply with either promise and the court allowed the daughter's claim as a third-party contract creditor against the estate.

[132] Iowa State Bar Association Committee on Professional Ethics and Conduct v. Seff, No. 227/90-O539, slip op. (Iowa, July 18, 1990); *see also* American Bar Ass'n, 6 Lawyers' Manual on Professional Conduct, No. 14 (1990).

funds for his wife. The attorney prepared a will but, before the father signed it, the father became hospitalized.

Since the lawyer's father was unable to talk or write, the attorney asked his father to squeeze his hand if he wanted to execute the will. After the father did so, the attorney backdated the will and used his secretary and daughter as witnesses. The attorney notarized the witnesses' signatures and went through the process a second time when his mother wanted an earlier date to appear on the will. Upon the father's passing, the executor offered the will into probate and the attorney made no disclosure concerning the execution process. The attorney's secretary, however, subsequently informed the Iowa Bar about the improprieties during the will execution.

The disciplinary committee reviewing the case concluded that the attorney violated several provisions of the Model Code of Professional Responsibility and recommended suspension for nine months.[133] The Superior Court, however, viewed the attorney's conduct as sufficiently egregious to merit indefinite suspension with no possibility of reinstatement for two years.

Even though no evidence that the attorney intended to defraud the government or a third party existed, the court concluded that his conduct in concealing the improper execution process was conduct prejudicial to the administration of justice and adversely reflected on his fitness to practice law. The court pointed out that the attorney involved others in his deception and breached the trust placed upon attorneys by the legal system.

Attorneys must observe high standards of honesty and integrity when representing clients. As this case dramatically demonstrates, all attorneys must meet these standards when assisting needy family members. MAJ Ingold.

Family Law Notes

Uniformed Services Former Spouses Protection Act

Federal legislation rarely has provoked more emotional reaction among soldiers and retirees than that associated with the Uniformed Services Former Spouses' Protection Act (USFSPA). A common complaint of soldiers and retirees involved in divorce proceedings in states using the USFSPA to divide military retired pay is that the Federal Government unfairly is "taking" a part of their hard-earned retirement benefits. The United States Court of Appeals for the Federal Circuit, however, rejected that argument on July 16, 1990. In *Fern v. United States*[134] the court held that the passage of the USFSPA did not constitute a taking of military retirees' property requiring compensation pursuant to the fifth amendment to the Constitution.

In rejecting the retirees' arguments, the court noted that the USFSPA has no effect on military retirees' entitlement to retired pay. Instead, the court found that the USFSPA merely allows state courts to award a portion of the retiree's pay to his or her former spouse. Because the retirees have no property interest in continued federal preemption of state laws concerning divisibility of federal retirement benefits, the court held that no compensable taking of the retiree's property had occurred.[135] CPT Connor.

New Hampshire Holds Military Retirement Pay Divisible as Property

Overturning a decision handed down ten years ago,[136] the New Hampshire Supreme Court ruled on July 23, 1990, that military retired pay is divisible as property in a divorce action. The court cited three reasons for its ruling in *Blanchard v. Blanchard*.[137] The first reason was the passage of the USFSPA. The second reason was the fact that a majority of the states now divide military retirement benefits in divorce actions.[138] Finally, the court noted that recent New Hampshire legislation includes "employment benefits, vested and non-vested pension or other retirement benefits" in the definition of property subject to equitable division in a state divorce action. CPT Connor.

Child Support Note

The Effect of Non-Judicially Sanctioned Changes of Child Custody on Support Obligations

In 1986, Congress acted to assist states in collecting child support from recalcitrant parents by mandating that states treat each month's court-ordered child support

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[133] The committee cited DRs 1-102(A)(1),(3),(4),(5), and (6); DRs §§ 7-102(A)(3),(4),(5),(6), and (8); and ECs 1-5, 8-5, and 9-6.

[134] 16 Fam. L. Rptr. (BNA) 1451 (Fed. Cir. July 16, 1990).

[135] While the plaintiffs in *Fern* did not assert directly that they had a property right in federal preemption of state law, the court, "lest there be any question," held that "a person has no property, no vested interest, in any rule of common law." *Id.* (quoting Munn v. Illinois, 94 U.S. 113, 134 (1876)).

[136] Baker v. Baker, 421 A.2d 998 (N.H. 1980).

[137] Blanchard v. Blanchard, 16 Fam. L. Rptr. (BNA) 1464 (N.H. Sup. Ct. July 23, 1990).

[138] For a listing of states that divide military retired pay as property in a divorce action see *The Army Lawyer*, June 1990, at 58-64.

payment as a judgment when it falls due.[139] Congress also moved to discourage noncustodial parents from trying to erase arrearages through forum shopping by decreeing that courts could not modify child support obligations retroactively.[140]

These federal requirements often catch noncustodial parents off guard when their child comes to live with them for an extended period of time. Typically, the operable child custody agreement makes no allowance for nonpayment of support under those circumstances. Frequently, the noncustodial parent ceases making child support payments because he or she is responsible for feeding, housing, and clothing the child.

The noncustodial parent's failure to pay the child support required in the child support decree, however, leaves the parent legally vulnerable. Because a court cannot modify the child support obligation retroactively, a change in physical custody of the child only can affect the noncustodial parent's child support obligation prospectively. Moreover, even when the parents mutually agree to the change in physical custody, the custodial parent can seek to execute a judgment for arrearages if the noncustodial parent discontinues child support payments.[141] A literal application of 42 U.S.C. § 666(a) means that the fact that the noncustodial parent is providing for all of the child's needs is virtually irrelevant.

Some courts have interpreted 42 U.S.C. § 666(a) to avoid penalizing caring noncustodial parents and to prevent windfalls for the undeserving custodial parent.[142] Nevertheless, legal assistance attorneys should advise their clients that the appropriate court should approve changes in child custody or child support to avoid the risk of assessment of arrearages. CPT Connor.

[139] 42 U.S.C.A. § 666(a)(9)(A) (Supp. V 1987).

[140] *Id.* § 666(a)(9)(C).

[141] *See, e.g.*, Goold v. Goold, 527 A.2d 696 (Conn. App. Ct. 1987) (awarding two years of child custody arrearages and denying noncustodial parent's request to offset amount he had spent supporting child during two years child had lived with him.)

[142] *See, e.g.*, Prikril v. Prikril, 513 A.2d 1164 (N.J. Super. Ct. Ch. Div. 1989). In *Prikril* both parties consented to the child's moving from the obligee's home to the obligor's home. The court found that, as a matter of law, a change in custody served to discharge the obligor's support duty and rendered the prohibition against retroactive modification of child support irrelevant. *Id.*; *see also* Karypis v. Karypis, 16 Fam. L. Rptr. (BNA) 1469 (Minn. Ct. App. July 10, 1990). In *Karypis* the noncustodial father quit paying child support when the children left the custodial mother and moved in with him. The court denied the mother's motion for arrearages reasoning that it was not retroactively forgiving arrearages, but instead was recognizing that the father had satisfied his support obligation during the period of time the children had lived with him. *Id.*

Claims Report

United States Army Claims Service

Update on Maneuver Damage Verification Procedures

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In the May 1988 issue of The Army Lawyer, Major Horst Greczmiel told readers about maneuver damage claims in the Federal Republic of Germany (FRG). In his discussion, he mentioned a need for United States Army Claims Service, Europe, (USACSEUR) to improve verification procedures. Since publication of his article, a number of changes in how USACSEUR verifies claims have occurred.[1] To appreciate the significance of those changes, one has to understand the limitations placed on USACSEUR's role in the maneuver damage claims process by pertinent international agreements. The North American Treaty Organization (NATO) Status of Forces

[1] In 1987, the United States General Accounting Office (study number GAO/NSIAD-88-191) and the USAREUR Maneuver Damage Task Force conducted separate studies of the existing maneuver damage claims verification system. Both studies concluded that the Army had to strengthen internal controls over payment of claims. Acknowledging that additional resources (personnel and ADP) would be necessary, the studies called for increased verification of the existence, nature, and extent of United States maneuver damage through on-site inspections and for an automated system to track maneuver damage claims at all times. Another requirement was that the Army adequately document all verification efforts.

Agreement,[2] the Supplementary Agreement,[3] and the Administrative Agreement between the United States of America and the FRG[4] govern the maneuver damage claims process. These agreements designate the Defense Costs Offices (DCO) as the German processing authorities for maneuver damage claims and designate USACSEUR as the relevant United States agency.[5]

The claimant must file a maneuver damage claim with a DCO, which forwards notice of the claim to USACSEUR. This notice contains the date, the location, the type of damage, and the amount claimed. USACSEUR investigates whether United States forces were involved in the incident causing the damage. If United States forces were involved, USACSEUR issues a scope certificate; if United States forces were not involved, USACSEUR issues a not-involved certificate. Along with the certificate, USACSEUR provides the DCO any information available to resolve the claim. The DCO inspects the alleged damage, determines liability, and subsequently adjudicates the claim. Upon final adjudication, the DCO pays the claim from FRG funds and requests reimbursement of the United States' share from USACSEUR.[6]

The authority to adjudicate and settle claims rests solely with the DCO; USACSEUR does not "participate" officially in this decision. USACSEUR may declare a claim "exceptional," which requires the DCO to submit the entire DCO case file to USACSEUR for "perusal" before making a final payment; however, the United States has no authority to negotiate or disallow the final settlement adjudicated by the DCO.[7] The agreements also do not provide for United States representation in on-site inspections of maneuver damage claims. USACSEUR's attending an increasing number of DCO inspections, and its playing an increasingly active role in the adjudication process, are largely attributable to new personnel who have facilitated United States participation through personal contacts with the German agencies.

Until the end of fiscal year (FY) 1988, USACSEUR had four personnel (an NCOIC, a claims examiner, and two caseworkers) to process and verify all maneuver damage claims arising out of United States training exercises in the FRG. Since October 1988, the Army has augmented USACSEUR's maneuver section by adding four additional personnel.[8] A senior adjudicator acting as section chief is responsible for drafting and implementing organizational and administrative procedures, to include organizing and documenting systems for USACSEUR's verification efforts. Three additional adjudicators primarily conduct on-site inspections of maneuver damage and review case files on maneuver damage claims requested from the DCOs. Two of these adjudicators work out of V Corps Headquarters in Frankfurt, and VII Corps Headquarters in Stuttgart, respectively. Their main function, besides verification of claims, is to provide liaison between USACSEUR, the Corps and their subordinate units, and the agencies of the German Defense Costs Administration in their respective areas. Excellent working relationships and an increased exchange of information among all agencies involved in the maneuver damage claims process have developed, which is particularly important in light of USACSEUR's limited formal rights to participate in the adjudication process. USACSEUR also hired a civil engineer who, although not assigned to the maneuver section, conducts on-site inspections of maneuver damage and evaluates maneuver damage claims decisions for technical accuracy. He also trains USACSEUR adjudicators to evaluate maneuver damage.

Verification of United States involvement in maneuver damage claims and control over the payment of claims depend largely on the availability of sufficient data. USACSEUR brought on line a UNYSIS 5000/80 minicomputer in late 1988. The computer system, with its new and vastly improved database using ORACLE software, captures maneuver damage claims data such as the

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[2]Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of their Forces, June 19, 1951, 4 U.S.T. 1792, T.I.A.S. No. 2846, 199 U.N.T.S. 67 [hereinafter NATO SOFA].

[3]Agreement to Supplement the Agreement between the Parties to the North Atlantic Treaty Regarding the Status of their Forces With Respect to Foreign Forces Stationed in the Federal Republic of Germany, August 3, 1959, 14 U.S.T. 531, T.I.A.S. No. 5351, 481 U.N.T.S. 262 [hereinafter Supplementary Agreement].

[4]Administrative Agreement Concerning the Procedure for the Settlement of Damage Claims (Except Requisition Damage Claims) Pursuant to Article VIII of the Agreement between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, dated June 19, 1951, in Conjunction with Article 41 of the Supplementary Agreement to that Agreement, as well as for the Assertion of Claims Pursuant to Paragraph 9, Article 41, of the Supplementary Agreement [hereinafter Administrative Agreement].

[5]Thirty-seven German DCOs administer all NATO SOFA claims, to include the representation of the United States in NATO SOFA claims-related litigation. The German states (Bundeslaender) employ DCO personnel, who work under the supervision of state finance agencies (Oberfinanzdirektion). The Federal Ministry of Finance supervises both agencies.

[6]Unless another force contributed to the damage giving rise to the claim, the United States pays 75% and the FRG pays 25% of the adjudicated amount. *See* NATO SOFA, art. VIII, para. 5e(i).

[7]Administrative Agreement, part B, sec. I, paras. 9, 15.

[8]Currently, the maneuver section consists of one senior adjudicator/section chief (local national grade C-7a, equivalent to GS-11); one E-6 NCOIC; one claims adjudicator (C-7, equivalent to GS-9); two corps adjudicators (C-7, equivalent to GS-9); one claims examiner (C-6, equivalent to GS-7); and two caseworkers (C-4a, equivalent to GS-4). USACSEUR's civil engineer holds a GS-12 position.

claim number, the claimant's name, whether the claimant is a private person or public entity, the DCO working the claim, the DCO file number, the dates and location of damage, the county in which the damage occurred, the type of damage, the exercise in which the incident causing the damage occurred, the amount claimed, the type of certificate that USACSEUR issued, and the status of the claim.

A variety of queries and screens are available to track claims under different aspects. For example, the computer system can monitor all claims filed by a given claimant or all claims filed for a given damage time frame. USACSEUR has just designed and installed an additional program to capture in detail all on-site inspections conducted. With these programs, USACSEUR always can track and evaluate claims and verification efforts. The only limitation on the system is the extent and specificity of the data provided to USACSEUR by the DCOs and by the United States units conducting the maneuver exercises.

USACSEUR maintains information on all United States exercises in the FRG in an automated program. According to USAREUR Regulation 350-22, units have to submit requests for maneuver rights to the Office of the Deputy Chief of Staff, Host Nation Activities, (ODCSHNA) before conducting a field training exercise; units also must submit a Master Maneuver Damage Report upon completion of the exercise.[9] ODCSHNA submits copies of all documents to USACSEUR. USACSEUR registers in the computer system all data extracted from those documents, such as time frame of an exercise, geographical area, troop strength, and equipment used (tracked and wheeled vehicles, aircraft) for every maneuver right issued to United States units. Against this information, USACSEUR screens all notices of claim. If the correlation is insufficient to establish United States involvement, USACSEUR coordinates further investigation with USAREUR maneuver management personnel.[10] Upon completion of the investigation, USACSEUR issues the appropriate certificate.

Until 1987, USACSEUR issued blanket scope certificates to DCOs for claims arising out of large multinational exercises. Under a post-maneuver protocol, the nations participating in these multinational exercises assumed responsibility for certain geographical areas, waived individual notification (blanket scope certificate), and waived verification for claims up to a certain deutschemark threshold. The purpose of these waivers was to ensure expeditious processing of a large number of inexpensive claims filed immediately after large maneuvers. To enhance USACSEUR'S control over budgetary resources, it eliminated the blanket scope certificate in January 1988. The elimination of the blanket scope certificate has led to an increase in claims that USACSEUR individually verified from 5709 in FY 1987 to 7504 in FY 1988 and to 7897 in FY 1989.

In major multinational exercises, special reporting procedures are required when a defined maneuver area suffers extensive maneuver damage in a limited period of time. USACSEUR employed an automated reporting system for the first time in a REFORGER exercise during Certain Challenge 1988, and further refined the reporting system during V Corps exercise Caravan Guard 1989 and during REFORGER exercise Centurion Shield 1990. USACSEUR recorded maneuver damage on standardized incident report forms that were easy to use and that allowed for easy transfer of the information into data registered in a database. USACSEUR collected the report forms at maneuver damage subcenters located throughout the maneuver area, where personnel entered the data on personal computers. At regular intervals, the personnel transferred the data into a master database at the maneuver damage control center.

The procedures used during these exercises enabled USACSEUR personnel, who were located at maneuver damage subcenters and at the maneuver damage control center, to inspect and to evaluate the severity of maneuver damage incidents immediately. Thanks to the database, USACSEUR always could monitor the damage situation. Combined with the information USACSEUR personnel gathered during extensive pre-and post-maneuver surveys of the damage situation in the maneuver area, the consolidated maneuver damage reports enabled USACSEUR to negotiate equitable cost-sharing agreements in the subsequent post-maneuver conferences.[11] USACSEUR continues to use these databases to verify maneuver damage claims arising out of these maneuvers. The use of these databases ensures expedi-

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[9] United States Army Europe, Reg. No. 350-22, Maneuver and Field Training Exercise Rights in the Federal Republic of Germany (22 Apr. 1986).

[10] These are primarily the brigade level maneuver management specialists and division or corps level maneuver management officers. They coordinate with local authorities prior to and after maneuvers, conduct pre-and post-maneuver surveys, and assist unit personnel in reporting damage.

[11] After large multinational exercises, the forces involved and German authorities hold post-maneuver conferences to divide claims responsibility among the participating nations. This apportionment is necessary to resolve unattributable damage that occurs when allied forces maneuver over the same terrain. Representatives of the participating forces, pertinent DCOs, state finance agencies, and USACSEUR negotiate claims responsibility for certain geographical areas based upon the weight of the forces, their equipment, the tactical scenario, and the reported incidents. Damages exceeding a certain monetary threshold, as well as certain categories of claims (torts, major structural damage, POL spills), are exempt from this procedure and remain the responsibility of the causing nation.

tious processing of claims despite the elimination of the blanket scope certificate.

Regardless of whether a claim arises out of a multinational maneuver or out of one of the approximately one thousand regular United States exercises conducted in the FRG each year, USACSEUR has an obligation to verify the nature and the extent of alleged damages. USACSEUR best accomplishes this mission by personally inspecting the damage together with DCO officials, who have more information on a given claim than USACSEUR can gather from the notice of claim. At the same time, joint on-site inspections give USACSEUR the opportunity to monitor DCO adjudication procedures.

Although not legally required to do so, DCOs have been very cooperative in inviting USACSEUR personnel to attend their inspections. Maneuver section personnel identify claims for inspection. Specifically, they will identify for inspection high cost claims (usually DM 100,000 and above) and claims involving unusual circumstances or excessive costs. In FY 1989, the USACSEUR maneuver section personnel and the civil engineer inspected 140 claims; most of these inspections lasted several days. Despite the legal limitations, USACSEUR personnel play an increasingly active role during the inspections through their discussing and negotiating with the DCO personnel items of damage, repair methods, and United States versus civilian causation.[12] USACSEUR personnel document in writing the findings of the inspections and use the reports for future reference. For example, USACSEUR often uses the documentation to monitor DCO adjudication of a claim or to compare the claim with future cases. Another method of exercising control over the payment of maneuver damage claims is reviewing DCO case files, which the Administrative Agreement permits in "exceptional cases." DCO case file review was the method by which USACSEUR exercised control over payments until 1988, when USACSEUR declared only claims exceeding DM 100,000 as exceptional. Since then, USACSEUR has expanded the procedure to include a variety of other claims, such as claims involving inordinate amounts claimed for the damage alleged, claims in which the claimant later increased disproportionately the amount initially claimed, claims involving unusual circumstances, and a growing number of randomly selected claims. In FY 1989, USACSEUR declared 127 claims exceptional so that USACSEUR personnel could review the case files for legal and technical accuracy. When USACSEUR conducted on-site inspections, it compared its findings with the final adjudication reflected in the case file. While the Administrative Agreement limits USACSEUR's rights in exceptional cases to mere perusal, USACSEUR recently succeeded in obtaining an agreement with several DCOs to discuss individual claims upon USACSEUR'S request.

In the past two years, thanks to additional personnel, greater ADP resources, and new internal procedures, USACSEUR has increased United States participation in the maneuver damage claims process dramatically. As a result, USACSEUR now possesses substantially improved internal control and verification abilities. No one could have predicted the rapid changes occurring in Europe, especially in Germany; nor can anyone predict the final result of these ongoing changes. However, United States presence in the FRG will continue and maneuvers, with concomitant damage, will continue to occur. Consequently, USACSEUR also will continue to take an active role in verifying claims to ensure fair settlement for all.

[12]Because of his expertise, USACSEUR's civil engineer participates in high-cost claims involving road damage, structures, and forests.

Claims Notes

Personnel Claims Notes

Retention of Personnel Claims Files in the Claims Office

After completing local action on a personnel claim[1] many claims offices are forwarding immediately the file to the Claims Service or a command claim service for retirement or recovery action. If the claimant thereafter requests reconsideration, USARCS or the command claim service must locate the file and return it, creating an administrative burden, as well as dissatisfaction in the field as a result of the delay in responding to the claimant. To resolve this problem to some degree, please apply the following rules for forwarding files.

Closed Personnel Claims. Before being forwarded to USARCS for retirement, settled personnel claims that do *not* have to be forwarded for any type of centralized recovery action will be retained in the claims office for forty-five days after settlement (if the claim does not

[1]Army Reg. 27-20, Legal Services: Claims, chap. 11 (28 Feb. 1990) [hereinafter AR 27-20].

have recovery potential) or forty-five days after completion of local recovery action (if the claim does have local recovery potential).

To accomplish this, enter the final settlement action or final local recovery action into the personnel claims management computer program on the day this action is taken. At the same time (so that you do not have to reopen the claim on the database), enter the "FF" code (Forwarded Finished all action (retirement ready) for the *following* day and run a screen printout for inclusion in the claims file. (If you enter the "FF" on the same day that you take final action, the two entries may get reversed when they are loaded on to the USARCS database!) *Then* hold the claim in your office for forty-five days and mail it to USARCS, marked "CLOSED" in red on the outside cover. Each office is directed to maintain a suspense system to forward closed files on a timely basis.

For example, if you deny a claim on 31 August 1990, on *31 August 1990,* enter "CD" on to the claim record with a date of "08/31/90," enter "FF" on to the claim record with a date of "09/01/90," and run the screen printout. Then hold the claim in your office and forward it to USARCS on 15 October 1990.

POV Shipment Files. POV shipment claims that should be forwarded *directly* to Military Sealift Command (rather than through a command claims service) for POV shipment recovery also should be retained in the claims office for forty-five days after settlement, pending possible reconsideration. The "TV" code may be predated as explained above for the "FF" code. For POV shipment claims forwarded through a command claims service, see below.

Centralized Carrier Recovery Files. The "forty-five day rule" does *not* apply to HHG or POV shipment claims, which must be forwarded to USARCS or to a command claims service for centralized recovery. Such claims, however, must be retained for twenty-one days after payment to allow for receipt of a request for reconsideration, and then must be forwarded for recovery action between the twenty-first and thirtieth day after payment.[2] Do *not* predate the "FR" or "FE" entry on these claims!

Offices may incorporate the following language in their settlement letters to ensure that personnel claims reconsiderations are identified in a timely manner:

> If you are not satisfied with the action taken on your claim, you have the right to request reconsideration. Your request must be in writing and must tell us what you are dissatisfied with. If you want your claim reconsidered, please call or write this office within two weeks of the date on this letter so that we can hold your file and avoid any delay in responding to you.

Adherence to these procedures will reduce the number of files that have to be returned to the field for reconsideration action and will assist the Claims Service by ensuring that the computer record for closed personnel claims is up to date on the USARCS database before the Claims Service receives the file. Note, however, that the "forty-five day rule" does *not* apply to tort claims, which must be retained in the claims office until the expiration of any appeal period or the six-month period for filing suit.[3] Mr. Frezza.

New Allowance List—Depreciation Guide

USARCS has published a new Allowance List—Depreciation Guide for use in adjudicating personnel claims. This guide is effective for claims that arise on or after 15 August 1990. Note that "arise" refers to the date of the incident giving rise to the claim (for example, the date the claimant's car was vandalized or the shipment was delivered), *not* the date the claim was filed. Claims personnel will continue to use the 1987 Allowance List—Depreciation Guide for claims that arose between 10 August 1987 and 15 August 1990. For this reason, claims offices are required to keep both the 1987 Allowance List—Depreciation Guide and the 1990 Allowance List—Depreciation Guide on hand. Each claims examiner should be given personal copies of both.

The new guide must be used in accordance with the principles set forth in AR 27-20 and DA Pam 27-162. The depreciation rates listed are guides, and the depreciation taken on an item should be adjusted if evidence establishes that the item was subjected to greater than average or less than average usage;[4] any deviation must be explained on the chronology sheet. By contrast, however, *only* the Commander, USARCS, may waive application of an item or category maximum allowance.[5]

Offices which have not received the new Allowance List—Depreciation Guide should contact USARCS at AV 923-3226. Mr. Frezza.

Personnel Claims Adjudicated in Excess of $25,000

When Congress amended the Personnel Claims Act in October 1988 to increase the statutory maximum to $40,000, the Commander, USARCS retained payment authority in excess of $25,000.[6]

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[2]Dep't of Army, Pam. 27-162, Claims, para. 3-21*b*(3) (15 Dec. 1989) [hereinafter DA Pam. 27-162].

[3]AR 27-20, para. 15-3.

[4]DA Pam. 27-162, para. 2-40.

[5]*See* AR 27-20, para. 11-13*b*; DA Pam. 27-162, para. 11-35.

[6]*See* AR 27-20, para. 11-20.

Between October 1988 and 1 July 1990, USARCS paid twenty-nine claims that were meritorious in amounts over $25,000. Nearly half of these claims arose from Operation Just Cause. Most of the remainder arose from the Gilbo warehouse fire in September 1989 and from Hurricane Hugo.

Because of the time needed to adjudicate a claim that involves the total loss of a soldier's personal property, emergency partial payments are normally appropriate in instances in which a claim is meritorious for an amount in excess of $25,000. USARCS approval, however, is required for any such payment.[7]

Accordingly, if an area claims office or command claims service adjudicates a claim as meritorious in an amount exceeding $25,000, that office will contact the Personnel Claims Branch telephonically prior to transferring the claim to USARCS.[8] This will allow the Claims Service to provide better service to these claimants. The USARCS points of contact are CPT Ward and Mr. Ganton at AV 923-3226/3229 or commercial (301) 677-3226/3229. Mr. Frezza.

Management Notes

New Accounting Codes for FY 91

In fiscal year 1991 (FY91) the accounting classifications for claims payments and refund accounts will undergo three changes. To simplify matters, the three changes are the same for every claims payment and refund account. The changes affect the fiscal year designator, the program element, and the MDEP.

The fiscal year is represented by the *third* digit in the *first group* of digits in every claims payment and refund accounting classification. In FY91 this digit advances from "0" to "1"; thus, the first group of digits is "2112020" instead of "2102020."

The *third group* of characters in claims accounting classifications is the program element. Beginning in FY91, DA responsibility for claims funds is transferred from Program 9 to Program 2. To reflect this change, the program element of the accounting classification for all claims payments and refunds changes from P951512 to P202099.

The third change involves the MDEP, which is the *fourth group* of characters in the accounting classification. The new MDEP is FAJA and replaces the currently used 1SCW. FAJA will be used in the accounting classification for all claims payment and refund accounts.

After making these changes, the FY91 accounting classification for Chapter 11 (Personnel claims) is:

Payment: 2112020 22-0201 P202099.11-4200 FAJA S99999

Refund: 2112020 22-0301 P202099.11-4200 FAJA S99999

The accounting classification for Chapter 4 (Federal Tort Claims Act) is:

Payment: 2112020 22-0203 P202099.21-4200 FAJA S99999

Refund: 2112020 22-0303 P202099.21-4200 FAJA S99999

The accounting classification for Chapter 3 (Military Claims Act) is:

Payment: 2112020 22-0205 P202099.23-4200 FAJA S99999

Refund: 2112020 22-0305 P202099.23-4200 FAJA S99999

The accounting classification for Chapter 6 (National Guard Claims Act) is:

Payment: 211020 22-0206 P202099.24-4200 FAJA S99999

Refund: 211020 22-0306 P202099.24-4200 FAJA S99999

The accounting classification for Chapter 5 ("Non-scope" claims) is:

Payment: 211020 22-0208 P202099.26-4200 FAJA S99999

Refund: 211020 22-0308 P202099.26-4200 FAJA S99999

Claims offices that pay claims through STANFINS Redesign Subsystem One (SRD1) should contact the system administrator at the servicing finance office to be sure these changes have been entered in the claims payment process.

Claims offices should be careful to always replace the old accounting classifications with the new ones whenever they are used. For example, the new accounting classification for personnel claims should be used in paragraph 4 of the sample carrier offset letter.[9]

As soon as FY91 funds are available, claims offices will be notified of their FY91 CEA and quarterly targets, and can then begin paying claims. Major Lazarek.

Federal Tort Claims Act Handbook

Recently USARCS distributed the new Federal Tort Claims Act Handbook to Army claims offices. Because this was printed locally, the supply is limited and only one copy was mailed to each claims office. This copy was intended to be part of the office library and not for the personal library of the claims judge advocate. COL Lane.

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[7] AR 27-20, para. 11-17*b*.

[8] *See* DA Pam. 27-162, para. 2-55*j*(1)(a).

[9] *See* DA Pam. 27-162, fig. 3-11.

Labor and Employment Law Notes

OTJAG Labor and Employment Law Office, FORSCOM Staff Judge Advocate's Office, and TJAGSA Administrative and Civil Law Division

Civilian Personnel Law

Blended Penalties in OSC Prosecutions

The Merit Systems Protection Board (MSPB) refused to approve a settlement agreement in an Office of Special Counsel (OSC) prosecution of three separate actions in which it found that prohibited personnel practices had occurred. In each case, OSC had entered a settlement agreement providing for both a $500 fine and a letter of reprimand. The board's chief administrative law judge (ALJ) had approved the agreements. OSC also sought reconsideration of two earlier board decisions that held that OSC could assess only one statutory penalty and not "dual" or "blended" penalties from the punishments listed in 5 U.S.C. § 1207(b).

OSC argued that statutory construction and an analysis of congressional intent supported its position that the list of penalties in section 1207(b) are conjunctive despite the use of "or" in the list. OSC argued that reading the word "or" in the statute as meaning "and" would be consistent with Congress's original intent. MSPB disagreed, reasoning that when Congress uses "or" in a statute with a list, the list "*cannot* be interpreted as conjunctive absent obvious legislative intent that it be so interpreted."

OSC was unable to point to any express provision in the legislative history of section 1207(b) to support its argument. The absence of support left OSC to argue that in several prior cases, it had imposed "dual" or "blended" punishments and Congress had not acted to say that those punishments were wrong. Citing one leading authority that congressional inaction was a "poor beacon to follow" on the seas of statutory construction, MSPB rejected the settlements and remanded the cases to the chief ALJ for further proceedings. *Special Counsel v. Doyle*, 45 M.S.P.R. 43 (1990).

Administrative Leave Has Its Limits

MSPB granted a Department of Defense (DoD) petition for review of an initial decision that put DoD in the uncomfortable position of having to acknowledge before the board that one of its activities had made a mistake in a settlement agreement. The Defense Investigative Service (DIS) entered into a settlement agreement with an appellant that essentially let him off for a year to look for work.

After appellant appealed his removal, DIS entered an agreement with him in which he withdrew his appeal. The agency also agreed to reinstate the appellant with back pay and place him on paid administrative leave for a year while he looked for another job. After the year, he would resign. The ALJ accepted the settlement into the record and dismissed the appeal. In its petition for review, the agency argued that it lacked the authority to expend appropriated funds to grant appellant such an extensive administrative leave and that the ALJ should set aside the agreement because the parties had acted upon a mutual mistake in agreeing to the administrative leave.

MSPB sought an advisory opinion from the General Accounting Office (GAO). In B-236124, January 2, 1990, the Comptroller General reaffirmed his position that agencies have discretion to grant administrative leave for brief durations only; longer periods are permissible only if the leave is in furtherance of the agency's mission. The Comptroller General stated that expending appropriated funds to pay the appellant to "stay at home" would not be in furtherance of the agency's mission. The opinion went on to state that the settlement agreement's authorizing the leave would not change the result. Despite an agency's having broad settlement authority, "such settlements cannot include benefits which the agency does not have authority to provide."

The board took care in a footnote to restate that it does not consider itself bound by Comptroller General opinions, but acknowledged that they do constitute "persuasive guidance." The board, however, considered itself persuasively guided by what the Comptroller General said. Accordingly, it vacated the agreement, remanding the case for reinstatement of the appeal.

This case presents two practice points of significant interest. First, labor counselors should be cognizant of Federal Personnel Manual (FPM) chapter 630 and FPM Supplement 990-2, book 630, provisions when considering remedies involving leave during settlement discussions. Second, though often overlooked, the form used to designate the agency representative in MSPB cases can be of importance. In this case, the appellant moved the board to dismiss DoD's petition for review, arguing that agency's designated representative did not submit it. The board found that although a representative other than the one designated in the initial pleadings submitted the petition for review, the agency had submitted a new designation of representative form and served it upon appellant and his counsel in accordance with the board's regulations. *Miller v. Department of Defense*, 45 M.S.P.R. 263 (1990).

"Stays" Involving Probationary Employees

The board continued its practice of liberally granting Special Counsel's requests for stays. OSC had requested, under 5 U.S.C. § 1214(b)(1)(A), that MSPB order a forty-five-day stay of the termination of a probationary employee. The Dallas Veterans' Medical Center had initiated the removal of a medical technologist. OSC argued that it had "reasonable grounds" to believe that the termination was in reprisal for the employee's disclosure of certain mismanagement and misconduct by other employees at the medical center. Relying on OSC's allegations and supporting affidavit, Chairman Levinson ordered the stay. He applied the same standard for granting a stay under the Whistleblower Protection Act of 1989, 5 U.S.C. § 1214(b), as under the previous stay provision at section 1208(a)(2). That standard requires the board to grant a stay "unless, given the attendant facts and circumstances, 'such a stay would not be appropriate.'"

What Chairman Levinson's order did not address is the impact of the stay on the employee's probationary status. The board has stated that a board-granted stay on application of the Special Counsel does not change the status of the probationary employee, even if the stay puts the employee past the probationary anniversary date. *See Special Counsel v. Department of Commerce*, 23 M.S.P.R. 469 (1984). In Special Counsel cases, an investigator's discussing with the agency a voluntary administrative stay of the proposed action pending completion of the Special Counsel investigation is not uncommon. A practice pointer for labor counselors in dealing with a Special Counsel case involving a probationary employee is to be cautious of the anniversary date vis-a-vis the length of the stay. An administrative stay is simply an agreement between the agency and the Special Counsel; it does not extend the probationary period. In this case, the agency asked OSC to go to the board to obtain a stay so that the agency would preserve the employee's probationary status. *Special Counsel v. Department of Veterans Affairs*, MSPB HQ12149010016, Stay Order (Apr. 25, 1990), 90 FMSR 5285.

AR 600-50 Violation Supports Removal

Vint Hill Farms Station removed appellant based on three charges. One concerned violation of the Army's and OPM's ethics regulations for: 1) advising a contractor that the government was at fault for untimely providing required documents to the contractor; and 2) for telling the contractor to seek compensation for any "schedule impacts" arising from the late delivery. Another charge involved appellant's failure, on a security clearance questionnaire, to notify the Army that he had resigned from his job while under notice of termination, that he had received a five-day suspension while employed by the Defense Logistics Agency (DLA), and that he had received a speeding ticket two years earlier. Another charge involved his false answer on two employment applications about his having resigned under notice.

The ALJ affirmed the removal, sustaining the ethics charge and the portion of the security clearance charge related to the five-day suspension; the ALJ did not, however, sustain the other charges. The board accepted the ALJ's rulings, except for a technical finding the ALJ made concerning the ethics violation. The agency charged appellant with failure to follow written regulations—specifically AR 600-50 and 5 C.F.R. part 735. The ALJ ruled that to show a violation of these regulations, the agency had to demonstrate that the appellant used his position to further a private interest for the "purpose of obtaining personal gain." The board, however, pointed out that the agency had charged the appellant only with generally using his position to further a private interest. It found that appellant had not sought personal gain. The ALJ's error was harmless, however, because the evidence supported the charge of furthering the private interest of the contractor.

The board refused to consider the Army's challenge to the ALJ's ruling that appellant was not obligated to disclose the circumstances surrounding his resignation from the previous employer. Because the Army had not raised the issue in a petition for review or a cross petition—but only in its response to appellant's petition for review—MSPB declined to consider the issue. *Lambert v. Department of Army*, 44 M.S.P.R. 688 (1990).

Excepted Service Appeals Law Enacted

The Civil Service Due Process Amendments, Public Law 101-376, has modified 5 U.S.C. § 7511, effective 17 August 1990. The measure extends to certain non-preference eligible employees in the excepted service, affects the procedural and appeal rights now accorded employees in the competitive service, and affects preference eligibles in the excepted service.

The law extends MSPB appeal rights of adverse actions to most nonprobationary excepted service employees who have completed two years of current continuous service in the same or similar positions in an executive agency under an other than temporary appointment.

Of significance is that excepted service employees covered by a collective bargaining agreement (CBA) that has a negotiated grievance procedure will have an election, based on the provisions of 5 U.S.C. § 7121(d). These employees may either grieve the adverse action or appeal directly to the MSPB.

Because of its immediate impact on many pending personnel actions, particularly those related to possible furloughs in fiscal year 1991, the Office of Personnel Management (OPM) has urged each agency to review

carefully the law and to modify any proposal or decision letters to comply fully with the law's provisions.

Labor counselors reviewing proposal or decision letters on excepted service employees should review carefully these documents to ensure that they address appeal rights if the employee meets the requirements of the law.

Labor Law

"Qualifying" Language In Proposals

The Federal Labor Relations Authority (FLRA) continued its mysterious analyses of the effect that qualifying language has on the negotiability of proposals that otherwise directly interfere with the exercise of a management right.

In a case involving the Naval Aviation Depot at Cherry Point Marine Corps Air Station, the controverted qualifier was "should." The union had proposed that the jobs and skills certified in employees' official training records "*should* be sufficient evidence of their ability to perform the specific skills listed" (emphasis added). The authority found that the language did not limit management's right to determine the skills needed for a particular job; rather, the proposal merely addressed the extent to which certain records establish an employee's qualifications. It then ruled that use of the qualifier "should" established only a presumption that an employee does possess the skill in question. Management retained the discretion to determine whether an applicant actually possessed the needed skills. *Naval Aviation Depot, Marine Corps Air Station, Cherry Point, N.C.*, 36 FLRA 28 (1990).

Negotiability of Performance Appraisal Review Board Proposals

Another proposal in the *Naval Aviation Depot* case discussed above would exclude from the negotiated grievance procedure grievances over performance appraisals. The proposal would substitute a process with an advisory board that would make recommendations to the commander on challenges to performance ratings. The board would include a union member.

The agency in *Naval Aviation Depot* had argued that the union would thereby impermissibly interject itself into the performance appraisal process. FLRA distinguished two earlier decisions that had ruled virtually identical language as being nonnegotiable. The cases were *Association of Civilian Technicians, Columbine Council and The Adjutant General, Colorado*, 28 FLRA 969 (1987) and *NAGE and National Guard Bureau, Adjutant General*, 26 FLRA 515, 519-20 (1987). Both cases involved union proposals to provide union membership on a panel to review and make recommendations on employee appeals of performance appraisals.

Notwithstanding the similarity of the language, the authority was able to draw sufficient distinctions to hold the proposal in *Naval Aviation Depot* negotiable. That proposal dealt only with a proposed "Depot Advisory Board" to review performance appraisal appeals of bargaining unit employees only, whereas in the *Association of Civilian Technicians* and the *NAGE* cases cited above, the board was a state-wide review board that reviewed appeals from unit and non-unit employees alike. The fact that the union would be sitting in review of appeals from non-unit employees in both those cases was critical to the authority's determining that the proposal impermissibly interjected the union into the management decision making process. Another minor distinction was that in the *Association of Civilian Technicians* and the *NAGE* cases, the union picked the union representative to the board. The *Naval Aviation Depot* proposal was for a slate of nominees from the union, with final selection by management.

Waiver of Weingarten *Rights*

The FLRA found that the Immigration and Naturalization Service (INS) had violated 5 U.S.C. 7116(a)(1) and (8) by coercing a bargaining unit employee into foregoing his right to have a union representative present during an investigatory interview. The INS had initiated an investigation into a fire that Mexican nationals had claimed Border Patrol agents had started.

Through INS management, agents of the Department of Justice Office of Professional Responsibility (OPR) had summoned the employee in question. When he appeared with his union president, the OPR agents explained to him that he was entitled to union representation, but that the employee's communication with the union representative would not be privileged in any subsequent criminal proceedings. The employee chose to continue the interview without the union present.

The FLRA recognized that, under section 7114(a)(2)(B), an agency may grant an employee the option of continuing the examination unrepresented or of foregoing the examination entirely. Rejecting the INS argument that the employee had chosen to go unrepresented, the FLRA ruled that the OPR agents' statements about the lack of privilege in criminal proceedings conveyed the erroneous impression that the employee was not entitled to his full *Weingarten* rights because the interview was possibly in connection with criminal proceedings. It agreed with the ALJ that the agency's tactics had intimidated the employee into foregoing his right to representation. Therefore, because the waiver was not voluntary, the INS, through OPR as its representative, violated the employee's *Weingarten* right to union representation.

The ALJ ordered as a remedy that INS either show that the employee received no disciplinary action as a result

of the interview (the United States Attorney chose not to pursue criminal charges), or, if the INS had subjected the employee to disciplinary action, to rerun the interview with appropriate representation and reconsider the discipline in light of the results of the repeated interview. *Department of Justice, Immigration and Naturalization Service, Border Patrol, El Paso, TX*, 36 FLRA 41 (1990).

GAO Questionnaire

The General Accounting Office (GAO) will be examining how well the federal labor management program is working after ten years of experience under the Federal Service Labor-Management Relations statute. As part of this effort, GAO will be conducting a survey of union and management officials who are directly involved in the day-to-day labor operations at the local and regional level. The GAO will be randomly selecting participants and the process will assure anonymity for all responses.

The GAO has requested the Army's assistance in encouraging labor relations specialists, as well as other management officials who receive the questionnaires, to fill them out in a timely fashion and to return them to the office indicated on the surveys.

The GAO may select some labor counselors to respond to the questionnaire, or labor counselors may get questions from management officials or labor relations specialists who have received the questionnaire.

Equal Employment Opportunity Law

Sexual Harassment Discipline—EEOC View

The Equal Employment Opportunity Commission (EEOC) Office of Review and Appeals has affirmed the Army's final agency decision (FAD), that agency officials subjected an appellant to hostile environment sexual harassment, but agreed with the appellant that the relief that she received should have included consideration of disciplinary action against the guilty agency officials.

The general rule in a discrimination case is that a claimant's insisting that the agency take disciplinary measures against a specific individual constitutes an improper remedy. This rule exists because findings of discrimination are against the agency, rather than against individuals.

When the Army, like other federal agencies, finds discrimination, it routinely will notify the activity in which it found the discrimination that the Army has identified one or more Responding Management Officials (RMOs) and that disciplinary action may be appropriate. Thereafter, the Army will require an independent investigation to determine if disciplinary action is appropriate against the RMOs it identified.

Practitioners should not take this FAD for the proposition that labor counselors and equal employment opportunity (EEO) officers may begin granting demands by complainants for disciplinary action against specific individuals to settle EEO complaints. First, most EEO complaints that reach settlement do not involve a finding of discrimination. Absent a finding of discrimination, granting a remedy that includes discipline against an agency official at the complainant's request is inappropriate. Second, while EEOC rules, at 29 C.F.R. § 1613.221(c)(3), state that when an agency finds discrimination it should consider whether disciplinary action is appropriate, the actual decision to take disciplinary action continues to rest with the agency. The complainant cannot insist upon the agency's taking disciplinary action to settle a complaint; that decision vests with the agency, not the complainant. Finally, the case discussed here involved sexual harassment—a particularly egregious form of discrimination. The EEOC has recognized that to prevent such misconduct from recurring, disciplinary action against the offending supervisor or employee— from reprimand to discharge— may be necessary. *Cassida v. Department of Army*, 90 FEOR 1102 (Apr. 30, 1990).

Sexual Harassment Discipline—MSPB View

Tamburello v. United States Postal Service, 90 FMSR 5402 (July 24, 1990), is the latest foray by the MSPB into reviews of an agency's action in disciplining officials found to have engaged in sexual harassment. The case illustrates that when sexual harassment discrimination has occurred, and the agency has decided to impose discipline, the battle is usually far from over. It also serves to illustrate why such decisions should be completely independent and separate from the EEO inquiry.

An employee subjected to discipline for discriminatory conduct will have independent grievance or appeal rights. If it is a disciplinary action that authorizes an appeal to the MSPB, the employee is entitled, as a part of the appeal, to have the ALJ engage in extensive scrutiny of the credibility of all the witnesses concerned. If the ALJ fails to make thorough credibility determinations, the agency faces having the case remanded or the penalty modified. One of the best cases that shows how such a case can bounce back and forth through the appellate system is *Hillen v. Army*, 35 M.S.P.R. 453 (1987). That case sets the standard for the type of credibility determinations the ALJ must make. In *Tamburello*, the agency demoted the appellant and reassigned him across the country to another position because he sexually harassed four subordinate female employees over a period of approximately eight years. The employee appealed the agency action by denying the charges, by making counter allegations that several of the women initiated the conduct, and by arguing that the timing of the action prejudiced him because some of the alleged acts of misconduct occurred too long ago.

The board found that the ALJ specifically had indicated where testimony either was uncontradicted or was corroborated by other witnesses or evidence of record. The board also found that the ALJ considered the witnesses' credibility in arriving at credibility determinations. The board held that the long delay in imposing discipline did not warrant a lesser penalty because the appellant previously had intimidated witnesses to the extent that they were afraid to come forward. In sustaining the penalty, the board found that the appellant's conduct in sexually harassing, threatening, and berating employees created an unpleasant and intimidating work environment for his subordinates.

Disciplining Employees for False Sexual Harassment Claims

The United States Court of Appeals for the Ninth Circuit recently upheld a United States Marshal's Service decision removing an employee who lied during the agency's internal investigation into sexual harassment charges brought by the employee. The employee falsely claimed that she had not been a voluntary participant in sexual activity with a co-worker.

The employee argued that because the filing of an EEO complaint prompted the internal investigation, Title VII's prohibition against reprisals protected any statements made in the internal investigation, whether truthful or not. The court rejected this contention, holding that while accusations made in the EEO process are protected, charges made in connection with an agency's internal investigation "are made at the accuser's peril." The court emphasized that the basis for removing the employee was that she lied in the internal investigation and not that she brought EEO charges. *Vasconcelos v. Meese*, 907 F.2d 111 (9th Cir. 1990).

Environmental Law Notes

OTJAG Environmental Law Division and TJAGSA Administrative and Civil Law Division

The following notes advise attorneys in the field of current developments in the areas of environmental law and changes in the Army's environmental policies. OTJAG Environmental Law Division and TJAGSA Administrative and Civil Law Division encourage articles and notes from the field for this portion of *The Army Lawyer*. Authors should submit articles by sending them to The Judge Advocate General's School, ATTN: JAGS-ADA, Charlottesville, VA 22903-1781.

Regulatory Notes

AR 200-1: Lawyers' Responsibilities and the Environmental Quality Control Committee

The recently revised Army Regulation 200-1[1] defines, for the first time ever, the responsibilities of Army lawyers in the Army's overall efforts to protect, preserve, and restore the quality of the environment.

At the installation level, lawyers must provide advice on interpreting environmental laws and regulations.[2] Additionally, lawyers will provide advice and guidance to commanders on their legal responsibilities for complying with all applicable environmental requirements.[3]

The installation lawyer tasked with meeting these responsibilities should be the installation's environmental law specialist (ELS).[4] To accomplish the mission, the ELS must be knowledgeable about environmental legal requirements. Equally important, the ELS must know about past, current, and anticipated installation activities with potential environmental consequences.

In the past, ELS's often were unaware of installation activities having potential environmental consequences. Many installation activities that the command should have scrutinized for compliance with environmental requirements occurred without the ELS's knowledge. This should change as a result of AR 200-1's new requirement that each installation form an Environmental Quality Control Committee (EQCC).[5]

The EQCC normally will meet monthly.[6] AR 200-1 requires the EQCC to advise the installation commander on environmental priorities, policies, strategies, and

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[1] Army Reg. 200-1, Environmental Protection and Enhancement (23 April 1990) [hereinafter AR 200-1].

[2] *Id.* para. 1-15*a*(2)(a).

[3] *Id.* para. 1-15*a*(2)(b).

[4] *See* Policy Letter 85-7, Office of The Judge Advocate General, U.S. Army, subject: Appointment of Environmental Law Specialists, 13 Dec. 1985.

[5] AR 200-1, para. 12-13.

[6] *Id.* para. 12-13*c*.

programs.[7] Membership on the EQCC is mandatory for all major staff sections, directorates, and tenant activities.[8] The ELS should be the installation Staff Judge Advocate's representative on the EQCC. Significantly, the installation commander or his designated representative must chair the EQCC,[9] ensuring a high level of command interest in the committee's activities. Membership on the EQCC will go a long way toward ensuring that the command keeps the ELS informed of environmentally sensitive installation activities. To realize maximum benefit from EQCC membership, however, the ELS must play a proactive role.

Frequently, installation personnel are unaware that the command must examine diverse activities such as training, changing installation land use, and even contracting, for their environmental impacts and compliance with environmental requirements. Ensuring that the EQCC discusses all relevant installation activities at its meetings requires that the ELS, together with the installation environmental coordinator, educate other EQCC members on the range of installation activities having potential environmental consequences.

Proposed Amendment of Categorical Exclusion A-14

AR 200-2 normally requires the command to file an environmental impact statement (EIS) whenever the Army performs the peacetime realignment or restationing of a CONUS unit whose size is equal to or larger than a table of organization and equipment brigade.[10]

When the only significant impacts are socioeconomic, and not biophysical, AR 200-2 does not require an EIS.[11] AR 200-2 embodies that exception in categorical exclusion A-14 (CX A-14).[12] CX A-14 is currently operative, however, only when the force reduction or realignment falls below the thresholds of a "reportable action," as Army Regulation 5-10 defines that term.[13]

The Army has proposed to amend CX A-14 to focus more on the environmental impacts of force realignments or reductions, rather than on numerical or percentage triggers. This change would be more in keeping with the rationale that only biophysical impacts trigger the requirement for an EIS. If the Army adopts the amendment as proposed, AR 200-2 will require an environmental assessment (EA) or EIS only if the force realignment or reduction: 1) exceeds a statutory trigger; 2) results in the disruption of environmental, surety, or sanitation services; or 3) otherwise requires an EA or EIS to implement.[14]

Revisions to National Pollution Discharge Elimination System Regulations

On 24 July 1990, the Environmental Protection Agency (EPA) published final rules dealing with pretreatment of industrial wastes and discharges of hazardous wastes to publicly owned treatment works (POTWs).[15] The regulations, which took effect on 23 August 1990, potentially impact on installations with their own sewage treatment system, as well as installations that discharge their sewage into local or regional POTWs.

Under current law, the Resource Conservation and Recovery Act (RCRA) does not regulate solid or dissolved solid materials in domestic sewage.[16] These materials cannot, therefore, constitute RCRA regulated hazardous wastes.[17] As a result, RCRA does not require industrial facilities that discharge hazardous wastes in domestic sewage to comply with its requirements for manifesting hazardous wastes. In addition, RCRA does

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[7] *Id.* para. 12-13*b*.

[8] *Id.*

[9] *Id.* para. 12-13*b*(1).

[10] Army Reg. 200-2, Environmental Effects of Army Actions, para. 6-3*f* (23 Dec. 1988) [hereinafter AR 200-2].

[11] *Id.*

[12] *Id.* app. A, sec. 1, at A-14.

[13] *Id.*; *see* Army Reg. 5-10, Reduction and Realignment Actions, para. 2-2 (26 Aug. 1977) [hereinafter AR 5-10]. AR 5-10 defines a reportable action as:

> (1) reductions resulting in the separation of the lesser of 50 or more permanent civilian employees who are U.S. citizens, or 10% of the civilian work force; and
>
> (2) realignments resulting in the dislocation of 200 or more military or 50 or more civilian jobs, or 10% of the installation's authorized military or civilian strength, whichever is less).

Id.

[14] 55 Fed. Reg. 29,636 (July 24, 1990) (to be codified at 32 C.F.R. pt. 651) (proposed July 20, 1990).

[15] *Id.* at 30,082 (July 24, 1990) (to be codified at 40 C.F.R. pts. 122 and 403).

[16] 42 U.S.C. § 6903(27) (1982).

[17] *Id.* § 6903(5) (1982).

not require POTWs that are receiving what would otherwise be RCRA regulated hazardous wastes intermixed in domestic sewage to satisfy RCRA requirements for treating, disposing, and storing of those wastes.[18]

EPA's revised regulations, however, will require POTWs meeting specified criteria[19] to test their effluent for toxicity that industrial discharges potentially may cause. As a result of this testing, POTW's may receive more stringent National Pollution Discharge Elimination System (NPDES) permit limits regarding toxic pollutant discharges. These new permit levels may require permittees to alter POTW operations or to limit industrial discharges into the POTW. To assist POTWs in meeting new discharge requirements, the EPA has issued new notification requirements. The EPA now requires all industrial users to notify EPA, the state in which the discharge occurs, and the POTW concerned of the nature and quantity of wastes disposed of in the sewer that, if otherwise disposed of, would constitute a RCRA hazardous waste.[20]

Case Note

Eighth Circuit Holds That the Endangered Species Act Applies Worldwide

On 10 August 1990, a three-member panel of the Eighth Circuit Court of Appeals upheld a district court's ruling that all United States agencies must consult with the Department of Interior whenever their actions adversely affect an endangered species, even if the agencies' actions take place outside the United States.[21] The court's ruling struck down a regulation issued by the Secretary of Interior that limited an agency's consultation obligation to "agency action in the United States or upon the high seas."[22]

Under section 7 of the Endangered Species Act (ESA),[23] federal agencies must engage in consultation with the appropriate service (Fish and Wildlife Service or National Marine Fisheries Service, depending on the species involved) when they anticipate taking any action that may impact on an endangered[24] or threatened[25] species or its habitat. In domestic situations, the consultation requirement generally precedes the issuing of a biological opinion[26] by the service involved.

Defenders of the Wildlife v. Lujan will have obvious impact on Army operations overseas unless a court reconsiders it or overturns it on appeal. Until the courts finally resolve the case, ELSs should coordinate overseas operations potentially impacting on endangered or threatened species with the Chief, Litigation Branch, Environmental Law Division.

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[18] *See* 40 C.F.R. pt. 264 (1989).

[19] 50 Fed. Reg. 30,128 (July 24, 1990) (to be codified at 40 C.F.R. § 122.21(j)).

[20] 55 Fed. Reg. 30,131 (July 24, 1990) (to be codified at 40 C.F.R. § 403.12).

[21] Defenders of Wildlife v. Lujan, Nos. 89-5192, 89-5386 (8th Cir. Aug. 10, 1990) (LEXIS, Envrn library, Allit file).

[22] 50 C.F.R. § 402.01 (1986).

[23] 16 U.S.C. § 1536 (1988).

[24] 50 C.F.R. § 424.02(e) (1989) ("endangered species" is a species in danger of extinction throughout all or a significant portion of its range).

[25] *Id.* § 424.02(m) (1989) ("threatened species" is a species likely to become endangered within the foreseeable future throughout all or a significant portion of its range).

[26] 16 U.S.C. § 1536(b)(3)(A) (1988). Based on consultation with the agency and the biological assessment (if any), the service involved will issue a biological opinion. The purpose of the biological opinion is to advise the commander on how the action proposed will affect the endangered species or its critical habitat. Three possible findings exist in a biological opinion: 1) the proposed action will not violate the ESA; 2) the proposed action will violate the ESA but no prudent alternatives exist; or 3) reasonable and prudent alternatives to the proposed action exist and they would not violate the ESA.

Personnel, Plans, and Training Office Notes

Personnel, Plans, and Training Office, OTJAG

Army Management Staff College

As part of the continuing effort to enhance the career opportunities for civilian attorneys, The Judge Advocate General has sought appropriate Army training for civilian attorneys. As a result of this effort, and based on the recommendation of a PERSCOM Selection Board, the Commandant, Army Management Staff College (AMSC) has selected the following civilian attorney for AMSC Class #90-3 (10 September-14 December 1990):

Mr. William E. Kumpe (GS-13), OCJA, ARPERCEN, St. Louis, Missouri.

The Army Management Staff College (AMSC) is a fourteen-week resident course designed to instruct Army leaders in functional relationships, philosophies, and systems relevant to the sustaining base environment. It provides civilian personnel with training analogous to the military intermediate service school level. AMSC has moved to Fort Belvoir, Virginia; however, while it renovates classroom space, AMSC will conduct its instruction at the Radisson Mark Plaza Hotel, Alexandria, Virginia.

The Judge Advocate General encourages civilian attorneys to apply for AMSC as an integral part of their individual development plans. Local Civil Personnel Offices are responsible for providing applications and instructions. Interested personnel also may obtain information by contacting Mr. Roger Buckner, Personnel, Plans, and Training Office (AVN: 225-1353). Dates concerning future classes appear below:

CLASS	DATES OF INSTRUCTION	DEADLINE
#91-2	13 MAY — 16 AUG 1991	14 JAN 91
#91-3	9 SEP — 13 DEC 1991	13 MAY 91

Please note that the listed deadline is the date the application must reach PERSCOM. MACOMS and local Civilian Personnel Offices may establish earlier deadlines for applications that they will process in their commands.

In addition to the normal application process, each attorney should provide one copy of his or her application, with an attached endorsement by the supervising staff judge advocate or command legal counsel, to the following address:

HQDA (DAJA-PT)
ATTN: Mr. Buckner
Pentagon, Room 2E443
Washington, DC 20310-2206

Standardized Position Descriptions

In 1987, The Judge Advocate General, Major General Hugh R. Overholt, authorized a study of management of the Army's civilian attorneys. One of the study's recommendations was standardization of civilian attorney job descriptions, both to streamline recruitment actions and to correct problems in position grading. An outgrowth of that recommendation was a PERSCOM study of Judge Advocate Legal Services civilian attorney positions worldwide. PERSCOM circulated proposed job descriptions to the field for comment, and on 18 July 1990, PERSCOM approved standardized position descriptions for six common civilian attorney positions. They include Attorney-Adviser (Contract) (GS-12), Attorney-Adviser (General) (Administrative Law) (GS-12), Trial Attorney (GS-13), Attorney-Adviser (Contract) (GS-13), Attorney-Adviser (General) (Claims) (GS-13) and Attorney-Adviser (Labor) (GS-13).

Not included in this group of position descriptions is the one for Chief, Legal Assistance. PERSCOM has delayed the release of this position description pending resolution of the Army's supervisory grading scheme. This delay does not reflect adversely on the quality of the description; and the Personnel, Plans, and Training Office continues to take the position that appropriate officials should grade Chiefs of Legal Assistance at least at the GS/GM 13 level. Official grading determinations remain the province of local commands.

Furthermore, the position descriptions do not reflect the increasing importance of environmental issues at military installations. When PERSCOM conducted its study, environmental issues were beginning to emerge as areas of increasing legal involvement. Administrative law positions that deal primarily with environmental law easily could justify grading at the GS/GM 13 level. At least one CONUS installation (Fort Hood) has succeeded in grading an environmental law position at the GS-13 level.

In addition to streamlining the recruiting process, the standardized position descriptions have assisted in upgrading the positions of nine Army civilian attorneys since January 1990.

In summary, standardized position descriptions provide a starting point for evaluating proper grading. The descriptions are a guide only, and appropriate officials may modify them to account for assignment of additional duties. These modifications could justify grading adjustments.

Copies of the position descriptions will appear in the next revision of Department of the Army Pamphlet 690-41, Standardized Position Descriptions. Personnel also may obtain copies of the position descriptions from the Personnel, Plans, and Training Office, ATTN: Mr. Roger Buckner.

Guard and Reserve Affairs Item

Judge Advocate Guard and Reserve Affairs Department, TJAGSA

Update to 1991 Academic Year On-Site Schools

The following information updates the 1991 Academic Year Continuing Legal Education Training Schedule published on page 56 of the August edition of *The Army Lawyer*:

GRA will hold the Philadelphia On-Site on 20-21 October 1990 at the Aviation Supply Office, 700 Robbins Avenue, Building #4, Philadelphia, Pennsylvania.

GRA has changed the location of the Washington, D.C., On-Site on 16-17 March 1991 from Fort Belvoir, Virginia, to Arnold Auditorium, National War College, Fort McNair, Washington, D.C.

CLE News

1. Resident Course Quotas

The Judge Advocate General's School restricts attendance at resident CLE courses to those who have received allocated quotas. **If you have not received a welcome letter or packet, you do not have a quota.** Personnel may obtain quota allocations from local training offices, which receive them from the MACOMs. Reservists obtain quotas through their unit or, if they are nonunit reservists, through ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132-5200. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOMs and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7110, extension 972-6307; commercial phone: (804) 972-6307).

2. TJAGSA CLE Course Schedule

1990

5-9 November: 25th Criminal Trial Advocacy Course (5F-F32).

26-30 November: 31st Fiscal Law Course (5F-F12).

3-7 December: 8th Operational Law Seminar (5F-F47).

10-14 December: 38th Federal Labor Relations Course (5F-F22).

1991

7-11 January: 1991 Government Contract Law Symposium (5F-F11).

22 January-29 March: 124th Basic Course (5-27-C20).

28 January-1 February: 105th Senior Officer's Legal Orientation Course (5F-F1).

4-8 February: 26th Criminal Trial Advocacy Course (5F-F32).

25 February-8 March: 123d Contract Attorneys Course (5F-F10).

11-15 March: 15th Administrative Law for Military Installations (5F-F24).

18-22 March: 47th Law of War Workshop (5F-F42).

25-29 March: 28th Legal Assistance Course (5F-F23).

1-5 April: 2d Law for Legal NCO's Course (512-71D/E/20/30).

8-12 April: 9th Operational Law Seminar (5F-F47).

8-12 April: 106th Senior Officers Legal Orientation Course (5F-F1).

15-19 April: 9th Federal Litigation Course (5F-F29).

29 April-10 May: 124th Contract Attorneys Course (5F-F10).

8-10 May: 2d Center for Law and Military Operations Symposium (5F-F48).

13-17 May: 39th Federal Labor Relations Course (5F-F22).

20-24 May: 32d Fiscal Law Course (5F-F12).

20 May-7 June: 34th Military Judge Course (5F-F33).

3-7 June: 107th Senior Officers Legal Orientation Course (5F-F1).

10-14 June: 21st Staff Judge Advocate Course (5F-F52).

10-14 June: 7th SJA Spouses' Course.

17-28 June: JATT Team Training.

17-28 June: JAOAC (Phase VI).

8-10 July: 2d Legal Administrators Course (7A-550A1).

11-12 July: 2d Senior/Master CWO Technical Certification Course (7A-550A2).

22 July-2 August: 125th Contract Attorneys Course (5F-F10).

22 July-25 September: 125th Basic Course (5-27-C20).

29 July-15 May 1992: 40th Graduate Course (5-27-C22).

5-9 August: 48th Law of War Workshop (5F-F42).

12-16 August: 15th Criminal Law New Developments Course (5F-F35).

19-23 August: 2d Senior Legal NCO Management Course (512-71D/E/40/50).

26-30 August: Environmental Law Division Workshop.

9-13 September: 13th Legal Aspects of Terrorism Course (5F-F43).

23-27 September: 4th Installation Contracting Course (5F-F18).

3. Civilian Sponsored CLE Courses

January 1991

3-4: ICLEF, Bankruptcy (Video), Valparaiso, IN.

3-4: ICLEF, Bankruptcy (Video), Indianapolis, IN.

3-5: ALIABA, Eminent Domain and Land Valuation Litigation, Tucson, AZ.

6-11: AAJE, Judicial Writing Program — Appellate Judges, Sarasota, FL.

8: ICLEF, Social Security (Video), Evansville, IN.

9-10: ICLEF, Bankruptcy (Video), Fort Wayne, IN.

10: ICLEF, Workers' Compensation/Social Security Disability (Video), Evansville, IN.

10-11: ALIABA, Broker-Dealer Regulation, Washington, D.C.

13-18: AAJE, A Judge's Philosophy of Law, Scottsdale, AZ.

14-18: ESI, Federal Contracting Basics, Scottsdale, AZ.

17-18: ALIABA, Employee Benefits Litigation, Washington, D.C.

17-18: PLI, Technology Licensing and Litigation, New York, NY.

20-25: AAJE, Rule of Law and Justice, Fort Lauderdale, FL.

21-24: USCLE, Institute on Federal Taxation, Los Angeles, CA.

23-24: ICLEF, Bankruptcy (Video), Evansville, IN.

25-27: MICLE, Strategic Planning Institute for Law Firms, Ann Arbor, MI.

28-1 February: GWU, Contracting With the Government, Washington, D.C.

30-3 February: AALL, Law Libraries: Serving the Judiciary, the Bar and Public, Williamsburg, VA.

31-1 February: PLI, Indenture Trustees and Bondholders: Defaulted Bonds, San Francisco, CA.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the August 1990 issue of *The Army Lawyer*.

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Month
Alabama	31 January annually
Arkansas	30 June annually
Colorado	31 January annually
Delaware	On or before 31 July annually every other year
Florida	Assigned monthly deadlines every three years
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Indiana	1 October annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	30 days following completion of course
Louisiana	31 January annually
Minnesota	30 June every third year
Mississippi	31 December annually
Missouri	30 June annually
Montana	1 April annually
Nevada	15 January annually
New Jersey	12-month period commencing on first anniversary of bar exam
New Mexico	For members admitted prior to 1 January 1990 the initial reporting year shall be the year ending September 30, 1990. Every such member shall receive credit for carryover credit for 1988 and for approved programs attended in the period 1 January 1989 through 30 September 1990. For members admitted on or after 1 January 1990, the initial reporting year shall be the first full reporting year following the date of admission.
North Carolina	12 hours annually
North Dakota	1 February in three-year intervals
Ohio	24 hours every two years
Oklahoma	On or before 15 February annually
Oregon	Beginning 1 January 1988 in three-year intervals
South Carolina	10 January annually
Tennessee	31 January annually
Texas	Birth month annually
Utah	31 December of 2d year of admission
Vermont	1 June every other year
Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June annually
Wisconsin	31 December in even or odd years depending on admission
Wyoming	1 March annually

For addresses and detailed information, see the July 1990 issue of *The Army Lawyer*.

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. The School receives many requests each year for these materials. However, because outside distribution of these materials is not within the School's mission, TJAGSA does not have the resources to provide publications to individual requestors.

To provide another avenue of availability, the Defense Technical Information Center (DTIC) makes some of this material available to government users. An office may obtain this material in two ways. The first way is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. Practitioners may request the necessary information and forms to become registered as a user from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone (202) 274-7633, AUTOVON 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. DTIC will provide information concerning this procedure when a practitioner submits a request for user status.

DTIC provides users biweekly and cumulative indices. DTIC classifies these indices as a single confidential document, and mails them only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and *The Army Lawyer* will publish the relevant ordering information, such as DTIC numbers and titles. The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC; users must cite them when ordering publications.

Contract Law

AD B100211	Contract Law Seminar Problems/JAGS-ADK-86-1 (65 pgs).
AD B136337	Contract Law, Government Contract Law Deskbook Vol 1/JAGS-ADK-89-1 (356 pgs).
AD B136338	Contract Law, Government Contract Law Deskbook, Vol 2/JAGS-ADK-89-2 (294 pgs).
*AD B144679	Fiscal Law Course Deskbook/JA-506-90 (270 pgs).

Legal Assistance

AD B092128	USAREUR Legal Assistance Handbook/JAGS-ADA-85-5 (315 pgs).
AD B116103	Legal Assistance Preventive Law Series/JAGS-ADA-87-10 (205 pgs).
AD B116101	Legal Assistance Wills Guide/JAGS-ADA-87-12 (339 pgs).
AD B124120	Model Tax Assistance Program/JAGS-ADA-88-2 (65 pgs).
AD B136218	Legal Assistance Office Administration Guide/JAGS-ADA-89-1 (195 pgs).
AD B135453	Legal Assistance Real Property Guide/JAGS-ADA-89-2 (253 pgs).
AD B135492	Legal Assistance Consumer Law Guide/JAGS-ADA-89-3 (609 pgs).
AD B142445	Legal Assistance Guide: Soldiers' and Sailors' Civil Relief Act/JA-260-90-1 (175 pgs).
AD B141421	Legal Assistance Attorney's Federal Income Tax Guide/JA-266-90 (230 pgs).

Administrative and Civil Law

AD B139524	Government Information Practices/JAGS-ADA-89-6 (416 pgs).
AD B139522	Defensive Federal Litigation/JAGS-ADA-89-7 (862 pgs).
*AD B145359	Reports of Survey and Line of Duty Determinations/ACIL-ST-231-90 (79 pgs).
AD A199644	The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.
*AD B145360	Administrative and Civil Law Handbook/JA-296-90-1 (525 pgs).
*AD B145704	AR 15-6 Investigations: Programmed Instruction/JA-281-90 (48 pgs).

Labor Law

*AD B145934	The Law of Federal Labor-Management Relations/JA-211-90 (433 pgs).
*AD B145705	Law of Federal Employment/ACIL-ST-210-90 (458 pgs).

Developments, Doctrine & Literature

AD B124193	Military Citation/JAGS-DD-88-1 (37 pgs.)

Criminal Law

AD B100212	Reserve Component Criminal Law PEs/ JAGS-ADC-86-1 (88 pgs).
AD B135506	Criminal Law Deskbook Crimes & Defenses/JAGS-ADC-89-1 (205 pgs).
AD B135459	Senior Officers Legal Orientation/ JAGS-ADC-89-2 (225 pgs).
*AD B137070	Criminal Law, Unauthorized Absences/ JAGS-ADC-89-3 (87 pgs).
AD B140529	Criminal Law, Nonjudicial Punishment/ JAGS-ADC-89-4 (43 pgs).
AD B140543	Trial Counsel & Defense Counsel Handbook/JAGS-ADC-90-6 (469 pgs).

Reserve Affairs

AD B136361	Reserve Component JAGC Personnel Policies Handbook/JAGS-GRA-89-1 (188 pgs).

The following CID publication is also available through DTIC:

AD A145966	USACIDC Pam 195-8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (250 pgs).

REMINDER: Publications are for government use only.

*Indicates new publication or revised edition.

2. Regulations & Pamphlets

Listed below are new publications and changes to existing publications.

Number	Title	Date
AR 37-104-10	Financial Administration, Interim Change 101	2 Jul 90
AR 40-1	Medical Services, Interim Change 101	1 Aug 90
AR 700-127	Integrated Logistic Support	17 Jul 90
JFTR	Joint Federal Travel Regulation, Vol. 1, Uniformed Services, Change 44	1 Aug 90
JFTR	Joint Federal Travel Regulation, Vol. 2, Civilian Personnel, Change 298	1 Aug 90
PAM 25-30	Index, Change 1	30 Jun 90
Pam 600-72	Army Manpower Mobilization	8 Jul 90
Pam 700-30	Logistic Control Activity (LCA) Information and Procedures	17 Jul 90

3. Audio-Visual Materials

A new videotape entitled "Methods of Instruction: The Three Stage Process" is now available through the JAG School's Visual Information Branch. To receive a copy of this program, send a blank videocassette to:

The Judge Advocate General's School, US Army
ATTN: Visual Information Branch (JAGS-IM-V)
Charlottesville, Virginia 22903-1781

Ask for the following videotape: Title: Methods of Instruction: The Three Stage Process; Number: A0106-90-0004; Running Time: 58:30

Synopsis: LTC Timothy E. Naccarato, former Chief of the Criminal Law Division at The Judge Advocate General's School, offers a process that judge advocates can use in successfully completing instructional missions. The discussion on tape is set up with an imaginative scenario in which the viewer is asked to picture himself/herself in the situation of being tasked with an assignment to deliver instruction in a few days to a live audience. Identifying the immediate panic that may grip some of the viewers in this situation, LTC Naccarato suggests that if instruction is carried out in a process method, success of the mission will be more likely to occur and the panic syndrome will be remedied.

The instructional process that LTC Naccarato presents involves three stages: preparation, rehearsal, and execution. The viewer is encouraged to use this process and to search for other information that will address successful teaching strategies. Particularly, LTC Naccarato refers to an article by COL Jack Rice in the May 1988 issue of *The Army Lawyer* in which COL Rice cites four practices used at The JAG School in delivering instruction.

In the first stage of LTC Naccarato's process—preparation—an instructor must answer six questions that address three specific factors: needs of the target audience, limitations of the teaching environment, and preparation of appropriate materials for the class. These questions are followed up with three actions to complete the preparation stage.

Rehearsal is the second stage in the process. On-site visits and on-site rehearsals are recommended, if possible. The viewer is informed of the advantages to such an approach to instruction and the possible expenses or errors that may be avoided by a good rehearsal.

Execution, the third stage of LTC Naccarato's process, is the time when the instructor actually delivers instruction to the audience. In addition to three general suggestions mentioned by LTC Naccarato (promptness, dress, and schedule), eight specific teaching techniques are highlighted for the viewer to avoid or overcome some of the problems that an instructor may encounter in front of a live audience.

By Order of the Secretary of the Army:

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Chief of Staff

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